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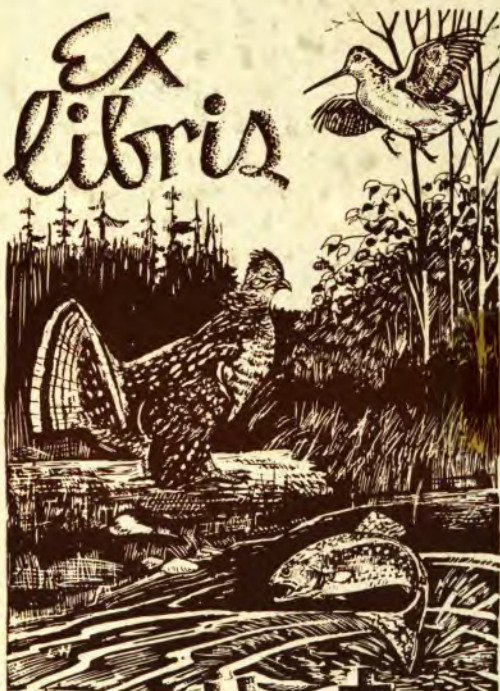
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THE  
PARR, SALMON, WHITLING & YELLOW-FIN  
CONTROVERSY:

WITH  
AUTHENTIC REPORTS OF THE LEGAL JUDGMENTS IN THE  
SCOTCH PROVINCIAL COURTS, AND JUDGES' NOTES  
IN THE VARIOUS LAW-SUITS ON THE  
QUESTION AT ISSUE;

AND ALSO  
A BRIEF SKETCH OF SOME INCIDENTS CONNECTED  
WITH THE DISSEMINATION OF THE MODERN  
PARR THEORIES,

BY  
HENRY FLOWERDEW,  
*Procurator before the Supreme Courts of Scotland, and Sheriff and  
Commissary Courts of Forfarshire; Author of the Dundee  
"Law Chronicle," and "Law Test."*

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SECOND EDITION.

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The world the river is; both you and I,  
And all mankind, are either fish or fry.  
If we pretend to reason, first or last,  
His baits will tempt us, and his hooks hold fast,  
Pleasure or profit, either prose or rhyme,  
If not at first, will doubtless take in time.  
*Isaac Walton's Book.*

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MANCHESTER:  
ABEL HEYWOOD & SON, 56 & 58, OLDHAM STREET.  
LONDON:  
SIMPKIN, MARSHALL & CO., STATIONERS' HALL COURT,  
1883.



P R E F A C E .

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The first edition of this book was published in 1871. There were only a limited number of copies thrown off. No copies are now to be had, except in the hands of private individuals, and in the respective libraries of the British Museum, of Oxford, of Cambridge, of Dublin, of the Edinburgh University Library, and of the Advocate's Library, Edinburgh; in short, the first edition is out of print, and has been so for ten years. This second edition has been increased in size by additions to the original printed text, by a preface, appendix of relative documents, and an index.

The interest which the public at large are now taking in piscatory matters is every day becoming self apparent. We have had an International Fishery Exhibition, held at Edinburgh, from the 12th to the 30th April, 1882, at which the fishery products of the United Kingdom, as well as of some foreign nations, were exhibited; and on the 1st of May, 1883, there was opened in London a more comprehensive International Fishery Exhibition, under the patronage of the Queen, whereat every foreign nation was represented, with relative fishery articles, combined with specimens of the fish found and bred in their respective dominions.

The late editor of *Notes and Queries* (W. J. Thoms, Esq., F.R.S., and one of the librarians of the House of Lords), in the year 1869, vol. 8, p. 524 of that periodical, has a



passage which it may not be out of place here to quote :  
 " It was observed by a profound scholar, who was at the  
 same time one of the shrewdest men I ever knew, that there  
 was hardly any book so worthless, but in it you could find  
 something you were glad to know."

Edinburgh, 1888.

H. F.

## INTRODUCTION.

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The topics in this book are of rather a miscellaneous description, and on this account it is hoped they will not share the fate of the Scotchman's "thorough-paced doctrine" which went "in at ae lug and oot at the ither."

Law is necessarily mixed up in it because fishes and their particular element are ruled, now-a-days, or, at least, attempted to be governed, by Acts of Parliament. We are too much enamoured by the constant announcements of the introduced simplicity of legal science, and that now we are not plagued by the gibberish of "special general imparlance" "special *testatum capias*," "special original," "*testatum pone*," "*protestando*," "*de bene esse*," &c., &c. Lord Ashburton once remarked on the profession of the law "It is generally ridiculed as being dry and uninteresting; but a mind anxious for the discovery of truth and information will be amply gratified for the toil in investigating the origin and progress of a jurisprudence which has the good of the people for its basis, and the accumulated wisdom and experience of ages for its improvement." And the opinion of the Lord Chancellor of Ireland, delivered in an address at the Social Science Meeting, in Liverpool, some years ago, is fully as important. His Lordship observed, "Improved procedure, amended laws, much to be valued though they be, yet, if we do not secure the moral elevation, the learned capacity and

the love of justice, in those who are to administer those laws, we deprive them of their loving fervour, and they take no root in the respect and affections of the people." Legal pursuits need not *alone* engross a man's attention ; as they do not open and liberalise the mind exactly in the same proportion. Mr. Raithby justly remarks " I protest I do not know any pursuit in life that requires such various powers: taste, imagination, eloquence." Of course these qualifications are only looked for in the higher ranks of the profession. It is expected a first rate advocate is acquainted with the leading details of the mechanical arts and sciences, of trade, commerce and manufactures ; of the correlative professions ; of the amusements and accomplishments of society, because in all of these questions are constantly arising which require the decision of a court of justice, for which purpose their most hidden concerns must be laid bare before the eyes of counsel, who is expected to be quite master of them. Sudden death, marriage, bankruptcy, or separation of one of the parties concerned rear up, in an instant, oftentimes, the most complex problems in human life, and if an advocate, with rapidity and skill, adjust conflicting rights with precision, he may be styled a benefactor to society.

G. R., the writer in *Land and Water*, in 1872, fairly enough observes that " the Game Laws do not perhaps represent the perfection of human wisdom, as evidenced by human legislation, nor is their operation at all times satisfactory ; but they possess this merit—they are not only clear as to their meaning and intent, but equally so as to their objects. When Hodge is brought before the Bench for wiring a hare, or stealing a hatful of pheasant's eggs, no plea is placed on record that the animal in question was a

polecat or a hedgehog ; no scientific witnesses are brought to prove that the eggs are those of the jay or pie. In this element of certainty the Game Laws are immeasurably in advance of the Salmon Laws."

The author of this work believes that if all parties adopted the word "moderation," as their motto, fish disputes would cease as well as game disputes. The *constant* pursuit of pleasure carries on its front something insolent and unfit for frail human beings. But we see now, oftentimes, that nothing is aimed at, in angling, but rivalry and self gratification. The writer already alluded to, G. R., uses these significant and strong words: "In another month thousands and tens of thousands of fry will be left in small puddles, by the efflux of the water. They are seen by shepherds, artizans, boys, and all who frequent the banks of the river, and as a rule are left to their fate—to die and rot, or to be picked up by herons and gulls. *If the shepherd could hope for a gift kelt at odd times, if the artizan could look forward to the fun of angling for the smolts, if the boys were permitted to catch his few fish for supper, they would one and all, as they used to do, ladle the fish out with their hands, or dig channels to permit of their escape to the body of the stream.*" Such sentiments and ideas are by no means fantastic. The author knows of a case in the Carse of Gowrie, Perthshire, in a measure, illustrating the truth of them. Mr. John Allan was a West India merchant, and returned to this country opulent. He purchased the estates of Errol and Inchmartin, in the middle of last century. They were in a great measure bog or marsh, affording fine wild duck and snipe shooting, and without almost any roads through the lands. Mr. Allan set himself at once to work the lands into

proper order by drainage and road making. Having accomplished that, and got proper tenants for his farms, he superintended the steadings and repairs thereof, at his own expense, and intimated to the said tenants that they had only to let him know when anything further was wanted, and he would be his own surveyor. This genial spirit brought its own reward. When Mr. Allan saw what was asked, and that it was requisite, he gave instructions to artificers to do the needful work at once. He and his tenants lived on the most cordial terms—no complaints were heard of passing through the lands in search of game. Mr. Allan, of course, like every other landed proprietor, had his private friends occasionally with him, and when they went on a shooting excursion Mr. Allan and his friends sent into the farmer's house, before leaving that particular farm, where they found game, a hare and two or three brace of partridges as a present, which cemented the good feeling existing. Mr. Allan died at Errol on 8th January, 1795, as is betokened by an inscription on a gold breast pin with a lock of his hair enclosed therein given to a relative of the author's, and which pin lies before him while writing these few lines.

## Parr, Salmon, Whitling, and Yellow Fin Controversy.

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THE subject of this work mainly relates to legal questions raised as to whether anglers are entitled to fish for and take what are called parr, without contravening the laws appertaining to salmon fishing. There is also involved the deeper question, whether parr, under the character of salmon fry, is entitled to a higher position than salmon—to be protected at all seasons against all persons. The discussion will likewise embrace some practical points bearing on the out-door amusement and healthful recreation of the humbler classes of the community, as well as the general features of the piscatory art.

Probably the reader may discover, after finishing the perusal of the work, that it comprehends topics which highly concern, not merely anglers, but the public at large. Moreover, to an intelligent mind the proceedings of a Court of Justice are always worth a scrutiny, as they present, in an authentic form, the dealings in a country betwixt man and man, attest and explain laws and customs, and show how the principles of law and equity are applied by the judges of

the land. Last century almost all classes of society took an active interest in this description of literature, as may be seen from *Arnot's Reports of Criminal Trials*, from the year 1536 to the year 1784, where, among the list of subscribers to the publication, may be observed English, Irish, and Scottish judges, barristers, nobility, landed proprietors, clergymen, medical men, attornies, and solicitors, and tradesmen of all grades. Lord Brougham, in his book titled the *British Constitution*, takes occasion to remark that the people, to be benefited, "must read for the sake of instruction, not for the momentary satisfaction of having their merriment excited, or their spleen gratified," (p. 118). Lord Kames, in the 4th edition of his *Principles of Equity* (Introduction, pages 27 and 28), dwells on the same subject, and insists on the benefit society at large would derive from the common people possessing a knowledge of those rational principles upon which law is founded. His words to that purpose are excellent words, and I will here set them down :—"Ignorance of law hath a most unhappy effect : we all regard with partiality our own interest ; and it requires knowledge no less than candour to resist the thought of being treated unjustly when a Court pronounces against us. Thus peevishness and discontent arise, and are vented against the judges of the land. This, in a free government, is a dangerous and infectious spirit, to remedy which we cannot be too solicitous. Knowledge of those rational principles upon which law is founded, I venture to suggest as a remedy not less efficacious than palatable. Were such knowledge universally spread, judges who adhere to rational principles, and who, with superior understanding, can reconcile law to common sense, would be revered by the whole society. The

fame of their integrity, supported by men of parts and reading, would descend to the lowest of the people—a thing most devoutly to be wished. Nothing tends more to sweeten the temper than a conviction of impartiality in judges; by which we hold ourselves secure against every insult or wrong. By that means, peace and concord in society are promoted; and individuals are finely disciplined to submit with the like deference to all other acts of legal authority. Integrity is not the only duty required in a judge: to behave so as to make every one rely upon his integrity, is a duty no less essential.” The late Lord Justice Clerk (Hope) was equally anxious that the public should derive benefit and information from legal proceedings ‘put into a *popular form*, when he, in 1858, in the case “*Fairholm v Pringle and others*,” (*Court of Session Reports*), used these words:—“It is curious that the best and most authentic, and indeed the only connected evidence as to the fate of the Franklin expedition, is that which is afforded by the proof in this case, which would form a most deeply interesting pamphlet.”

Angling is an amusement confined to no particular class of society—the peer and the peasant are equally zealous votaries. Sex forms no barrier—the woman of rank and the woman of the commonalty enjoy the sport. Age interposes no obstacle—the old, middle-aged, and young engage in the same pursuit. It is an innocent pleasure, conducive to health, and salutary both for body and mind. Sir Humphrey Davy, a philosopher, a man of science, and very competent judge, gives a summary of the various attractions of angling, and the reason why it has not unfrequently been pursued with ardour by poets and philosophers. “The search after,” says he, “food is an instinct belonging to our nature; and



from the savage in his rudest and most primitive state, who destroys a piece of game, or a fish, with a club or a spear, to a man in the most cultivated state of society, who employs artifice, machinery, and the resources of various other animals to secure his object, the origin of the pleasure is similar, and its object the same ; but that kind of it requiring most art may be said to characterise man in his highest or intellectual state ; and the fisher for salmon and trout with the fly employs not only machinery to assist his physical powers, but applies sagacity to conquer difficulties ; and the pleasure derived from ingenious resources and devices, as well as from active pursuits, belong to this amusement. Then, as to its philosophical tendency, it is a pursuit of moral discipline, requiring patience, forbearance, and command of temper. As connected with natural science, it may be vaunted as demanding a knowledge of the habits of a considerable tribe of created beings—fishes and the animals they prey upon ; and an acquaintance with the signs and tokens of the weather and its changes ; the nature of the waters, and of the atmosphere. As to its poetical relations, it carries us into the most wild and beautiful scenery of nature, amongst the mountain lakes, and the clear and lovely streams that gush from the high ranges of elevated hills, or that make their way through the cavities of calcareous strata.” Since the first edition of this work was published, in 1871, there has been considerable agitation in England, Ireland, Canada, and Australia, relative to breeding salmon and trout ; and the Scotch colonists in Canada and Australia might find something amusing, if not instructive, in this second edition, besides a recalling to mind of the lines of Burns’s song, “ Auld Lang Syne,”—

"We twa hae paidl't i' the burn,  
 Frae morning sun till dine ;  
 But seas between us braid hae roared,  
 Sin' auld lang syne."

The parr, which has principally originated the controversy in the Law Courts of Scotland, is described in these terms :—  
 "In the salmon rivers of Scotland, a small fish, having transverse dark marks across the back to the lateral line, is known under the name of the parr. By many observers it has been, and still is asserted that the parr is only the young or smolt of the salmon at a certain stage of growth ; some, on the other hand, regard it as a variety of the young of the common trout. It is the *salmo salmulus* of Willugby, and we believe, with Mr. Yarrell and Sir W. Jardine, that it is a distinct species from either,—one of the smallest of the family ; and it is remarkable that, in those unprotected rivers from which poaching has driven the salmon, it abounds in profusion, as well as in some streams which the salmon never visit ; while in others, frequented both by the salmon and the sea trout, it is not to be found. Nor is it the young of the common trout, from which it differs in various anatomical peculiarities. The young of the salmon, the bull trout, the common trout, and others, have dark transverse marks, which become lost sooner or later, depending on the ultimate size of the species. 'Thus,' says Mr. Yarrell, 'they are soonest lost on the salmon and the bull trout, and are borne the longest on the common trout and parr. Indeed, I have never seen the parr at any age or size without some trace of the remains of these markings. It is this similarity in marking and appearance of the fry which has caused the difficulty in distinguishing between the various species when so young ;

and experimenters, believing they had marked young parr only, have been surprised to find some of their marked fish return as grilse, young bull trout or whitling, salmon trout, river trout, and true parr.' Mr. Yarrell alludes to the young of other animals being marked, and ultimately losing markings which are prominent in other species of the family; thus, the young lion and the puma are marked like the young of the tiger, and the young of all deer are spotted, though the greater number of the species when adult are plain. Formerly, when the water of the Thames was purer, the parr or samlet was common between Staines and Chertsey, and was known by the name of skeygar. It is now rarely to be found, and Thames salmon is out of the question."

The common trout (*salmo fario*) inhabits most of the rivers and lakes of Great Britain; but so considerable does it vary in appearance in different localities, as to lead to the *supposition that several species exist*. The gray trout (*salmo ferox*), often called the bull trout or round tail, is distinguished from these by several specific peculiarities. The spawning season with the trout is generally October or November, but sometimes a little sooner or later. In this it differs from most other fish, who usually spawn in the spring months, and some in the summer. The trout is in perfection in the months of May, June, and July. The salmon—which Izaak Walton styles the king of fresh water fish, (but which might be properly enough designated a cannibal king, devouring as it does its own offspring, and even the true parr, as the evidence adduced in the law cases, subsequently noticed, shows)—makes a furrow in the gravel, working with its snout against the stream; the female then deposits a number of eggs in it, and covers them up. By this process, in ten or

twelve days the whole of the eggs are deposited. Supposing the eggs to be deposited early in November, they are hatched in March, or early in April, and the young fry exhibit a rapid growth. After spawning, the salmon begin their descent to the estuary, and so enter the sea, to commence their re-ascent in the autumn. A short time both before and after spawning, the male fish is orange or red, and the flesh of both male and female becomes hard and unpalatable; the *male* is then called a "*red fish*," and the *female* a "*black fish*," from its dark hue. (This will explain some expressions in the preamble of the statute 9, Geo. IV., cap. 80.) Mr. Buist, in 1831 (Perth, Dec. 16, 1831), writes that the salmon begin to spawn about the middle of October, and continue until about the end of January. The fry come to life in March, and disappear until they are seen in April about the size of parrs. At this era (1831) many practical fishers doubted whether grilse were the young of salmon—so Mr. Buist says. Again, another writer in the same year complains that naturalists have not sufficiently attended to the fact, that there are *different kinds of salmon for each particular river*. This is literally making confusion worse confounded. (*Quarterly Journal of Agriculture*, May, 1831.)

The special and technical information respecting the nature and habits of salmon and trout which goes before, has been derived from *Cassell's Popular Natural History*, volume 4th, a valuable work, which will well repay an attentive perusal of its contents. A thorough knowledge thereof would lead many people to treat animals with more kindness than they presently do. There are contained in the autobiography and correspondence of Mary Graville (Mrs. Delany), edited by the Right Honourable Lady Llanover, some very pleasing inci-

dents of the effects of kind treatment to the feathered tribe. "The robins fly to the doctor's hand for crumbs: one saucy fellow is fed with almonds, at which he pecks so long that his mate appears to see what keeps her husband, when, with equal tact and gallantry, he crams her beak before she can scold him." The same results flow from kindness and consideration in human affairs; harmony and good fellowship are thereby rendered conspicuous. The following short note from Queen Charlotte to Mrs. Delany, will more readily explain what is meant by kindness and consideration: "My dearest Mrs. Delany, if coming to me will not fatigue your spirits too much, I shall receive you with open arms. Your affectionate friend,—CHARLOTTE." And a still more modern example may be seen in the following incident, in the year 1882, which needs no eloquence of language to exalt it: Her Majesty has recently placed a head-stone over the graves of Mr. and Mrs. Warne in Whippinghan church-yard, which bears the following inscription, which was written by Her Majesty:—"To the respect and memory of Thomas Warne, died December 27th, 1881, aged 69; and of Louisa Warne, his wife, died September 16th, aged 65, who during 27 years had charge of the Swiss Cottage, in Osborne. This stone was erected by Queen Victoria and her children, 1882." "He that is faithful in that which is least, is faithful also in much."

It is very plain that legislators have a tangled skein in natural history to deal with when they undertake to legislate for the benefit of the Salmon Fishery Boards of Scotland. They would require to adopt a careful process of distinguishing before defining, the want whereof makes defining so extremely dangerous. The Tay Fishery Board, for instance, tried it

luck first in the Law Courts, and being there foiled, they sought the intervention of Parliament, as will be more fully explained in the sequel. It would be useless to doubt of the power of that august assembly to give redress, because Sir Edward Coke writes, that the power and jurisdiction of Parliament is so transcendant and absolute, that it cannot be confined, for either causes or persons, within any bounds. It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws concerning matters of all possible denominations—ecclesiastical or temporal, civil, military, maritime, or criminal. While, however, such is its omnipotency, it would be wise to remember Lord Treasurer Burleigh's pithy apophthegm, that "England could never be ruined but by a Parliament," implying thereby the judicious selection of subjects for legislation, with great circumspection in the handling thereof, and still greater thought and attention from those whose duty it is to embody them into Acts of Parliament, before receiving the royal assent. As Mr. Warren writes, in his *Abridged Blackstone's Commentaries*,—"It is useless for the Legislature to speak unless it be rightly understood; and if, as unfortunately too often happens in modern times, it do not give itself leisure to use plain and consistent language, it taxes judicial ingenuity needlessly, and, by multiplying lawsuits, grievously oppresses those classes whom it so improvidently affects." This same subject appears to have attracted the attention of Lord Stanley, now the Earl of Derby. In his inaugural address in the Glasgow University in April, 1869, his lordship observed, "Men live in haste;" and he went on to describe, in a vivid manner, "the life-long hurry which prevents us

studying condensation." It would not be amiss for people in these days to adopt the great Lord Hale's motto, which he ordered to be engraved on the top of his staff, "*Festina lente.*"

There has been a great deal of legislation connected with the preservation of salmon,—even the Legislature has been asked to throw the shield of protection over trout. The plan, however, has not altogether proved efficacious. Some short time ago, when the telegraph wires were mischievously injured, the Postmaster-General made a wise and manly appeal in the public newspapers to the good sense and patriotism of the community at large ; telling them the wires were public property, now that the Government had purchased the different telegraph lines, and that every person had an interest in protecting the wires and bringing to condign punishment wilful destroyers thereof. The appeal seems to have been heartily responded to, for outrages of the sort have entirely ceased. It is doubtful, if Parliament had been applied to, and had enacted penal legislation, that the evil-doers would have been so soon extinguished. So a like policy might be tried with the preservation of fish in the rivers of Scotland. The public might be appealed to to preserve the breed. If the different rivers and burns are placed in their primitive state, fish of all sorts will, no doubt, amazingly increase, and become food for the poorer classes to a much larger extent than at present prevails. So far as the humbler experts of the piscatory art are concerned—such as artisans and peasantry—they are often weighed down by large young families, provision for whom must be made. A man in that position, by taking his rod and line, and going to some neighbouring stream, may be able to make a fair addition to

his otherwise frugal meal, and that without injuring the rights and privileges of any one.

In tracing upwards the different legislative enactments applicable to salmon, it may not be necessary to go further back than the 15th July, 1828, when the statute 9, Geo. IV., cap. 89, was passed. The preamble of that statute is expressed as follows :—“ Whereas, by an Act passed in the Parliament of Scotland in the year 1424, it was forbidden that any salmon be slain from the Feast of Assumption of Our Lady until the Feast of Saint Andrew, in winter ; and whereas sundry other Laws and Acts were made and passed at diverse times by the Parliament of Scotland anent killing salmon, kipper, red, and white fish, in forbidden time, and the killing and destroying of the fry and smolts of salmon, which Laws and Acts were ratified, confirmed, and approved by an Act passed by the said Parliament in the year 1696, entitled, ‘ Act against killers of black fish, and destroyers of the fry and smolts of salmon ;’ and whereas it is expedient for the preservation of the Salmon Fisheries in Scotland that the penalties enacted by the said Act should be augmented, and the period of the forbidden time altered and extended, and sundry other regulations should be made.

“ Be it enacted, by the King’s Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in the present Parliament assembled, and by the authority of the same, that the said Act passed in the year 1424 shall be, and the same is, repealed : And that no salmon, grilse, sea trout, nor other fish of the salmon kind, shall be taken in or from any river, stream, lake, water, or estuary whatsoever, or any part of the sea coast, between the 14th day of September and the



1st day of February in any year, by any person or persons, any law, statute, or practice to the contrary notwithstanding." Section 14th specially bears that the statute does not extend to England, or Ireland, or Berwick-upon-Tweed, or to the fisheries in the river Tweed, or of any of the streams or waters which run into or communicate therewith. There is not throughout the Act a more extended specification of fish than what is above quoted. The terms "red" and "black" will be understood by glancing backwards at the last portion of the material taken from *Cassell's Natural History*.

The next salmon statute, in direct order of time, claiming notice, is 7 & 8 Vict., cap. 95, promoted by the Tay Fishery Board. It was passed on the 9th August, 1884, and bears special reference to 9 Geo. IV., cap. 89. There are circumstances connected with this statute of 7 & 8 Vict., cap. 95, requiring observation. A lawsuit, at the instance of Robert Buist, superintendent of the salmon fishings of the Tay, against a man of the name of Crawford, had been instituted before the Sheriff of Perth in April, 1844, to have him subjected in the penalties set forth in the 9 Geo. IV., cap. 89, for illegally catching salmon. The presiding judge found it proved that "whitlings" were the kind of fish caught, and there was no such fish described in the statute libelled on as whitlings, and declined to convict the defendant of the alleged crime laid to his charge. The law so enunciated is sound. Mr. Justice Forster, so justly celebrated for his writings, lays down the rule thus:—"It may be laid down, as a general rule, that indictments founded upon penal statutes, especially the most penal, must pursue the statute so as to bring the party within it." A full report of the legal contest and judgment will be found in a subsequent page hereof.

*The complainers acquiesced in the decision, and did not appeal to the Justiciary Court under the powers given them by the statute under which they instituted the prosecution. The Sheriff's judgment was pronounced on the 19th April, 1844. The locus where the offence was alleged to have happened was "on a towing-path by the river Earn." The prosecutors, instead of taking the opinions of the supreme judges of Scotland, went in August, 1844, direct to Parliament, and sought redress there. The preamble of the statute which they got (7 & 8 Vict., cap. 95) is expressed thus:—"Whereas an Act was passed in the 9th year of the reign of His Majesty King George IV., entitled 'An Act for the Preservation of the Salmon Fishery in Scotland:' And whereas it is expedient to prevent the destruction of salmon, or fish of the salmon kind, in the sea or shores thereof: And whereas doubts are entertained of the provisions of the said Act being applicable to the sea or sea shore: Be it therefore enacted, by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same: That if any person, not having a legal right, or permission from the proprietor of the salmon fishery, shall, from and after the passing this Act, wilfully take, fish for, or attempt to take, or aid or assist in taking, fishing for, or attempting to take in or from any river, stream, lake, water, estuary, firth, sea loch, creek, bay, or shore of the sea, or in or upon any part of the sea within one mile of low water mark, in Scotland, any salmon, grilse, sea trout, whitling, or other fish of the salmon kind, such person shall forfeit and pay not less than ten shillings, and not exceeding five pounds, for each and every offence,"*

&c. There is a second, third, and fourth short section, providing for nothing therein derogating from 9 Geo. IV., and also for the preservation of the property of the Crown. Now the Sheriff never expressed an opinion that the Act 9 Geo. IV., did not apply to the sea and sea shore. It was the *fish* he expressed doubts about, hence the introduction into the new statute of "whitling," so as to render nugatory in all future time the Sheriff's judgment. It would not only have been a satisfactory, but a really constitutional course, to have made the preamble of the statute bear some reference to the Courts of Law. If Parliament is kept ignorant in this respect, it may unwittingly be instrumental in rendering the decisions of the Courts of Justice throughout the country inoperative. Whenever a powerful and influential man, or body of men, feel dissatisfied with the adjudication of a matter or matters in the regular tribunals of the State, they may promote, and have passed through Parliament, a statute to frustrate the effects and natural working of the judgment. It may not be useless here to give an account of how Bills are passed through Parliament. Mr. Warren, to whom reference has already been made, gives the information in these terms : "To bring in a Bill, if the relief sought by it is of a private nature, it is first necessary to prefer a Petition, which must be presented by a Member, and usually sets forth the grievance to be remedied. This Petition, when founded on facts that may be in their nature disputed, is referred to a Committee of Members, who examine the matter alleged, and accordingly report to the House ; and then, or otherwise upon the mere Petition, leave is given to bring in a Bill. In public matters, the Bill is brought in upon motion made to the House, without any

Petition at all ; but there are many Standing Orders, relative to both classes of Bills, which must be strictly complied with, or a compliance specially dispensed with. Formerly all Bills were drawn in the form of Petitions, which were entered upon the Parliament Rolls, with the king's answer thereunto ; not in any settled form of words, but as the circumstances of the case might require : and at the end of each Parliament, the judges drew them into the form of a statute, which was entered on the Statute Rolls. In the reign of Henry V., to prevent mistakes and abuses, the statutes were drawn up by the Judges, before the end of the Parliament ; and in the reign of Henry VI., Bills in the form of Acts, according to the modern custom, were first introduced. The enacting style of every Bill, as we have already seen, is as follows, and is now to be used but once, and at the commencement of each (statute 13 & 14 Vict., cap. 21): 'Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same.' To a student of constitutional law, these words are pregnant with significance."

Another source from which important information may be derived, relative to the formation of Acts of Parliament, is a pamphlet by Dr. Barclay, Sheriff-Substitute of Perth, entitled *Curiosities of Legislation*, published in 1864, by W. R. McPhun & Son, Glasgow. There are certainly strange and startling discrepancies related, and a few of these will be taken notice of. The account given by that gentleman of the manner of passing statutes is fully more plain and minute than Mr. Warren's. "The mode in which 'Bills'—

the progenitors of Acts of Parliament—are framed, and pass through the Chambers of the Legislature, is open to great objection. A Bill is framed by a private person, called a draftsman—perhaps it is the first time he has tried his ‘prentice hand’ on law-making. He may be profoundly ignorant of common law, and of prior statutes. Two or three Members of the Commons House have their names endorsed on the Bill, as its foster fathers or sponsors. But frequently this is no more than a form, as often the honourable Members are not acquainted with the details of the Bill, far less its effect on existing law. In fact, it is often, as bankers say, ‘indorsed without recourse.’ The Bill, being introduced to the House, passes through its various stages of the threefold reading and Committee. The Bill being printed, copies are sent down to counties, and, if not very lengthy, it finds a place in the newspapers. Important Bills are canvassed, and either opposed in whole, or in some clauses. Suggestions for improvements flow rapidly. The county and city Members, anxious to show attention to their constituents,—especially when the season for the dissolution of Parliament draws nigh,—communicate and urge these recommendations on those who are nominally intrusted with the progress of the Bill. This is often done without consulting the draftsman, and in ignorance of how it will amalgamate with the original clauses. The Bill, having passed through the crucible of the Commons, is sent to the Upper House, where two or three peers take the duty of nursing the legislative babe. It has there to pass through similar stages; and parties who had not succeeded in obtaining favour for their *nostrums* in the other House, now press their suggestions with increased activity. New clauses

are added, and former ones are withdrawn. Sometimes the two Houses come in collision, even upon some nice question of grammatical construction, on which Lindley Murray might be the most fitting tribunal." Again it is written, "If there be a want of superintendence in the progress of Public Bills towards maturity, much more does such exist in regard to Private Bills. Often in the statutes are found clauses inimical to public policy, to the liberty of the subject, and contrary to the clearest principles of justice. There are now, in the volumes of our Statute Book, nearly thirty thousand local, personal, and private Acts. Lord Brougham has remarked that private Acts of Parliament annually dispose of millions of property, compared with which all that the Courts of Law and Equity throughout the country dispose of, in the course of the same twelve months, sink into insignificance."

The inconsistencies of statute law take various forms. In an Act for rebuilding a county jail, it was enacted that the prisoners should be kept in the old building until the new erection was completed; but some economical member had foisted in a clause that the stones of the old building should be taken to erect the new structure. There was an Act to regulate the trade of the dye known as "madder," but there was an omission to use that word in any part of the Act, so it was utterly defective and unworkable. The Act of 18 and 14 Vict., cap. 26, as to piratical ships, was passed to come into operation on "*first June next*," intended for 1850; but as the royal assent was not given until the 25th June, and the operation would have been suspended for a year, a short Act was hurried through the same session to bring the statute into retro-active operation, 18 & 14 Vict., cap. 26

& 27. The same subject was again reverted to by the learned Sheriff in the year 1879, in the *Journal of Jurisprudence*, vol. 28, p. 289, and an English "Barrister," on the 23rd December, 1881, wrote a letter about the difficulties both the Bench and the Bar experienced in construing modern statutes, which letter appeared in the *Times* of 27th December, 1881. The reader cannot do better than peruse the whole pamphlet itself. A good suggestion is made by Dr. Barclay to cure the defects which presently exist. "*First*, That there be a Minister of Justice, under whose superintendence all legislation be carried through. This functionary should have a competent staff of legal assistants as experts, to whom would be entrusted the preparation and progress of all Bills intended to result in statutes. All suggestions adopted by either House of Parliament, and ordered to be incorporated into the statute, would be introduced by this body, who would see that they are not merely in harmony with the whole code of law, but consistent with itself and existing statutes. *Second*, That when any amendment of a statute is rendered necessary, the statute should be repealed, and renewed in an amended form; and thus the law for every specific object should be found in one statute, without reference to others of prior date." If anyone feels an interest as to how Scotch statutes are framed and carried through the House of Commons, we would further refer to Lords Redesdale's, Skelmersdale's, Hawarden's, and Denham's Protest, in the House of Lords, on Friday, 18th August, 1871, on the repeal of a vital and most important point of then existing Scotch law, generally known as the Reduction *ex capite lecti* Act. See printed appendix for a copy of said Protest.

The complaint, *Buist v. Crawford*, was based on the Act 9

Geo. IV., cap. 39, and Crawford was charged with fishing in *the Earn*, on the lands of Elliothead, the property of the Earl of Wemyss, "with intent to kill salmon, grilse, sea trout, or other fish of the salmon kind." There is nothing about fishing in the "sea or sea shore" libelled, nor any specification of "whitling." There were no grounds whatever for putting a preamble into the new Act 7 & 8 Vict., cap. 95, so far as the contest with Crawford went, expressed in these words—"Whereas doubts are entertained of the provisions of the said Act being applicable to the sea or sea shore." In fact, hardly any would doubt for a moment the applicability of the terms 9 Geo. IV., cap. 39, to the sea or sea shore. Accordingly, fourteen years after the new Whitling Act was got, a prosecution was instituted, under and in terms of 9 Geo. IV., cap. 39, by Mr. Galbraith, clerk to the proprietors of the salmon fisheries in the river Forth, against an angler of the name of Shaw. This case will be found fully noticed and reported at a subsequent page hereof. If the framers of the statute 7 & 8 Vict., cap. 95, passed 9th August, 1844, and in which was inserted the species of fish called "whitlings," were asked who entertained doubts of 9 Geo. IV., cap. 39, being applicable to the sea and sea shore, they would find great difficulty in answering the question satisfactorily. To make the answer of any use at all, the doubts must have sprung from some judicatory, either supreme or inferior, and, as has already been noticed, they took good care that no judgment of the Supreme Court should affect them or trammel them in the least from going to Parliament.

The Inferior Court judgment, which sent them in such haste to Parliament, was as follows :—



## BUIST v. CRAWFORD.

PERTH, 19th April, 1844.—Having taken evidence for the prosecution and for the defence, and heard parties' procurators,—Finds, it not proved that the accused party, time and place mentioned in the complaint, was in trespass, with intent to kill salmon, grilse, sea trout, or other fish of the salmon kind: Therefore assolzies him from the conclusions of the complaint, and decerns in his favour against the complainer for one pound of expenses, and the expense of extract.

HUGH BARCLAY.

*Notes.*—The complaint is laid on the third section of the Act 9 Geo. IV., cap. 39, which is in these words: "And be it further enacted, That if any person shall, after the expiration of two months from and after the passing of this Act, trespass in any ground, enclosed or unenclosed, or in or upon any river, stream, watercourse, or estuary, with intent to kill salmon, grilse, sea trout, or other fish of the salmon kind, such person shall forfeit and pay any sum not less than ten shillings, and not exceeding five pounds."

It was recently found at Perth Circuit (Lord Mackenzie) that this section was operative the whole year without reference to close or open season.

The prosecution of offenders under this Act is most summary and severe. Any person, without warrant, can seize another transgressing against the Act, and carry him before a Justice. Prosecutions are open to any person who may prosecute, and the offender is immediately brought before the justice without any citation, or time to prepare for trial. There is no record of the evidence, and, of course, no appeal on the merits. If the penalty is not paid, imprisonment for any period less than six months may be awarded. Where the operation of the statute is so stringent, great care must be taken that it be not extended beyond its strictest letter.

The Sheriff-Substitute is of opinion that the plea in defence—that the accused was fishing on a towing-path by the river Earn, to which the public have right, and that the part of the river where he fished is not private property, but has been fished by the public for time immemorial—is not a good plea, if it were proved that the accused was fishing for salmon. The statute is to protect property in salmon: and unless the offender can show right to take salmon at the place charged, he is guilty of the trespass on that species of property.

But the Sheriff-Substitute rests his decision on the ground that whitlings, which, it is admitted and proved, were the only kind of fish the accused had taken, or was intending to take, are not distinctly proved to be of the salmon kind.

No better or sounder axiom of interpretation is known, than that penal statutes are rigidly interpreted; and where there exists a doubt, it must be given in favour of the accused. Neither must a statute be carried beyond, or restrained within, its clear intendment. If, in the progress of events, it becomes expedient to obtain a greater or lesser range, the Legislature must be had recourse to; and it would be unconstitutional and unsafe to leave such powers of extension or restraint in the hands of the magistracy.

The Act now sought to be enforced is entitled "for the preservation of the salmon fisheries in Scotland;" and after reciting sundry old statutes, the preamble is, that "it is expedient, for the preservation of the salmon fisheries in Scotland, that the penalties enacted by the said Acts should be augmented, and the period of the forbidden time altered and extended, and that sundry other regulations should be made." There is no expression of intention to regulate other fishings than those of the salmon. In none of the old statutes, or in the decisions in reference to salmon fishings, has the Sheriff-Substitute been able to discover the name of whitling as falling under the property of salmon.

The statute, in the section under consideration, has the words, "salmon, grilse, sea trout, or other fish of the salmon kind." In regard to the three enumerated species, there can be no doubt as to the application of the statute; but with reference to the general description appended, the Sheriff-Substitute is of opinion that the fact of other fish falling under the description of the salmon family, must be so clear and notorious, that there must be as little doubt in the public mind in reference to them as to the species enumerated. Accordingly, there can be no doubt as to "smolts," which, indeed, are expressly enumerated in other sections of the statute as the "fry of salmon."

The complainer maintained that whitlings were the young of the sea trout, and stood in the same relative situation to that fish as grilse are understood to do to salmon. On the other hand, the accused maintained that the whitling was a perfect fish, and in no ways connected with other tribes.

In support of his view, the complainer called two gentlemen, fishers of considerable experience, and who coincided in the opinion maintained by the complainer; but the evidence of these

gentlemen rested chiefly on the fact of the similarity of the appearance of the two fish, and that the former were never found of any great size.

On the other hand, the accused called an operative fisher of sixteen years' experience ; a fish-hook maker, and accustomed to fish for forty years ; and two other amateur fishers of extended experience—all of whom gave their decided opinion in favour of the fact maintained in defence. One other operative fisherman of great experience, gave his opinion with the complainer, that the whitling was the young of the sea trout, but he was equally positive that the sea trout was not of the salmon kind. None of the witnesses pretended to any scientific knowledge, but gave their opinion entirely founded on their own experience.

The complainer then produced a volume of the Naturalist's Library (1843) on British Fishes, by Dr. Robert Hamilton. The Sheriff-Substitute has considerable hesitation in admitting such as legal evidence. It is merely the opinion of an individual, no doubt of high eminence, but not made evidence in the only way recognised by law. The writer states (p. 133) that what was at one time described by Pennant, Dr. Fleming, Sir William Jardine, and other writers, as the white trout (*S. Albus*), "Ischthyologist are now agreed is nothing more than the salmon trout, after being for a time in the sea, and returning to fresh water ; and in this state they are called herlings, or whittings, sometimes phinocks." "Mr. Shaw states that the young of the salmon trout, at the age of six months, bear no very marked resemblance to the young of the real salmon, either in the parr or fry state ; and that as they advance in age and size, the resemblance becomes still lighter. Their resemblance to the young of the common trout is, however, very striking." Again, (p. 137) "According to Mr. Shaw, the young of the salmon trout and of the common trout are so strikingly alike, that it is extremely difficult to distinguish between them." It is thus seen that the certainty of the identity of the fish is a question of extreme difficulty.

But though the authority of the book were fully admitted, it does appear to the Sheriff-Substitute to prove too much for the complainers, as, under the *genus salmo*, there is placed by the author the salmon, the parr, bull trout, salmon trout, white trout or whitling, common trout, Lochleven trout, great lake trout, and the char. In short, there are very few fish known in our rivers, which, under this interpretation, are not included within the protection of the statute ; and the classes not enumerated, but left to

be guessed or proved, are far more numerous than the species named, In short, to give the Act the full interpretation contended for, would effectually convert it into "an Act for the *prevention* of fishing." It is thought that the Act of Parliament was intended to be read popularly, and not scientifically, nor to teach natural history. What may be popularly and notoriously held to be of the salmon kind, may have the protection of the statute under the general words of the law ; but the Sheriff-Substitute cannot lend himself to countenance *ex post facto* law—first establishing, by proof, that the fact complained of is an offence, and punishing the party for that act done before such ascertainment. It may be well to give public instruction in natural history, but tuition under the infliction of fine and imprisonment is not the most likely to be productive of public advantage.

It is highly proper to preserve the valuable property in salmon, and to prevent the destruction of the young, and especially of the fish at the spawning time, a practice at once destructive of the breed and detrimental to public health. But it is a matter for grave consideration, whether this protection is best to be obtained by *now* rigorously denying to the public what they have ever been accustomed to enjoy, because of recent conflicting and still doubtful opinions of naturalists, as to what precise tribe each member of the finny family belongs.

H.B.

*Act.*—James Condie, Perth : *alt.*—George Clements, Perth.

The Tay Fishery Board, after being worsted in the foregoing action, Buist *v.* Crawford, lost no time in going to Parliament to get a new Act, which they got on 9th August, 1844, and in testing the efficacy of their new-acquired statute, or Whitling Act. In little more than four months after getting hold of it, they took an opportunity of flaunting it before the public eye, by suddenly swooping down on an unfortunate and uninformed angler, who happened to be amusing himself on the banks of the river Earn. Robert Buist, their superintendent (the same person who sued Crawford), presented a complaint to the Sheriff of Perth (the same Judge who decided Crawford's case), founding on the 1st section of the new Act (*viz.*, 7 & 8 Vict., cap. 95, dated

9th August, 1844), against Andrew Marshall, residing Crieff. That angler, however, resembled the rest whom the Tay Fishery Board have had the good fortune to deal with. He was as warlike as they, and gained a complete legal victory. Thus ended for the time the fleshing of the new Parliamentary sword. A report of the suit, *Buist v. Marshall*, is here inserted. The Sheriff's note, attached to his judgment, fully explains the facts and law. The charge made against Marshall was couched in these terms:—"For having, on the 1st day of February, 1845, wilfully taken, fished for, or attempted to take, from the river Earn, salmon, grilse, sea-trout, whitling, or other fish of the salmon kind, and that by means of a rod, tackle, and cleek, or otherwise, without having a legal right, or permission from the proprietor of the salmon fishings." The *locus* is the same as in Crawford's case, viz., the river Earn.

#### BUIST v. MARSHALL.

PERTH, 26th February, 1845.—Having taken evidence, and heard parties' procurators thereon,—Finds it proved that, time and place libelled, the defender was fishing for salmon; but finds it not proved that he had no legal right or permission from the proprietors of the salmon fishing there: Therefore dismisses the complaint; finds the complainer liable to the defender in fifteen shillings of costs, for which, with the expenses of extract decerns.

HUGH BARCLAY.

*Note.*—The question raised was one of law, whether the right or permission to fish for salmon at the place libelled lay with the defender to prove or the prosecutor to negative.

The defender alleged leave given him by the late Abercainey, and tacit homologation thereof by the present proprietor of the estate. But it was stated, on the other side, that the salmon fishings belonged to Lady Willoughby, and not to Abercainey.

The complaint is laid on the recent Act 7 & 8 Vict., cap. 95, which appears to be an amplification of the third or trespass section of the previous Act of 9 Geo. IV., cap. 39, and which is not repealed by the recent Act. By that section, "All *persons trespassing* on any ground, enclosed or unenclosed, or in or upon any river, stream, water-course, or estuary, with *intent* to kill salmon, grilse, sea trout, or other fish of the salmon kind, are made liable to a penalty of not less than ten shillings or more than five pounds."

By the recent statute it is enacted, "That if any person, not having a legal right or permission from the proprietor of the salmon fishery, shall, from and after the passing of this Act, wilfully take, fish for, or attempt to take or aid or assist in taking, fishing for, or attempting to take in or from any river, stream, lake, water, estuary, frith, sea, loch, creek, bay, or shore of the sea, or in or upon any part of the sea, within one mile of low water mark, in Scotland, any salmon, grilse, sea trout, whitling, or other fish of the salmon kind," shall be liable to the same amount of penalty as provided for in the third clause of the previous statute, with the addition of forfeiture of the fish, as well as boat and all other fishing implements.

The term trespass in the first Act implied the absence of "right" or "permission," but these words are especially mentioned in the recent statute.

The prosecutor stood on the general rule, that no party in law was bound to prove a negative.

For the defender, it was argued, that the offence is not *malum in se*, but *malum prohibitum*—that the party complained of must therefore be held to have a right to do what he was doing, unless the want of right was established—that the statute is a highly penal one, and must receive strict interpretation—and that the prosecutor must therefore allege and prove *all* that the statute requires to constitute the offence.

The rule appears fixed in England. "Where an exception *is in the enacting clause*, giving a right or forfeiture, the party suing for the right or forfeiture must negative the exception. (Gill v. Scrivens, 7 *Termley Reports*, 27.) But the same rule is not followed where the exception is not incorporated with the enacting clause by any words or reference (*Steel v. Smith*, 1 *Barwell and Anderson's Report*, 94); or where it is a subsequent proviso (*Spiers v. Parker*, 1 *Termley Reports*, 194); or in a subsequent statute (*Rex v. Hall*, 1 *Termley Reports*, 320).

Accordingly, in the Day Game Trespass Act, 2 & 3 Will. IV., cap. 68, where "*without leave* of the proprietor" is incorporated in the penal clause, the 12th section expressly provides, that the "prosecutor is not required to prove a negative." Under that Act, the proprietor or Fiscal can alone prosecute; whereas, in the Salmon Act, the prosecution is open to all who may inform. Similar provisions will be found in the Coining Act, and other statutes.

Accordingly, in England it has been held that, "in a conviction on the Game Acts, it required to be particularly and *negatively* specified that the defendant had not *any* of the qualifications required by the statute," (*Rex v. Jarvis*, 1 *Burrows*, 148); but the evidence need not negative *every* specific qualification (*Rex v. Crowther*, 1 *Termley Reports*, 125).

The question still remains as to what *amount* of negative evidence is necessary to satisfy the statute.

It does not appear to the Sheriff-Substitute that it is necessary to produce a *full* proof, but only such evidence as may raise a reasonable belief of the *non-existence* of liberty, and that the defender was *in trespass*, leaving the defender to redargue the legal presumption hence arising.

Under the Hawkers' Act, 50 Geo. III., cap. 41, section 7, a *general* proof that the person was not a householder in the place is declared sufficient. Under 42 Geo. III., cap. 107, making it felony to course deers "*without consent of the owner*," it has been held that "proof of the non-consent must be given by the prosecutor, but that it was not necessary to call the owner himself to prove the negative" (2 *Campbell's Reports*). A contrary rule might impose an impossible proof on the prosecutor—*ex. gr.* where the owner is in foreign parts, or permanently disabled from giving evidence.

The Sheriff-Substitute, after examining the authorities, and consulting with the Sheriff, is of opinion that want of legal right or permission must be specially averred in prosecutions under the Salmon Act; and he recommends that the name of the proprietor of the salmon fishery should be given, or, if there be no such proprietor at the place, the name of the proprietor of the ground adjacent, and in this respect the present complaint is defective. He further is of opinion, that, if the proprietor himself is not examined, there must be some reasonable amount of evidence of no legal right or permission, by the examination of the factor or steward, keeper or person to whom such leave would be communicated and made known.

It is thought that the offender may be called specially to plead to the existence of permission ; and the non-existence, under a decision of Lord M'Kenzie on the previous statute, appears competent to be established by the defender's oath.

The statute is justified for the preservation of a valuable species of property, forming no inconsiderable item of national wealth, and which, where not granted to, or acquired by, proprietors, remains with the Crown. But where there has been so long and prevalent notions of the public right to fish with the rod in open season for salmon, and, especially, the lesser members of that family, and at places not under lease to fishers, great delicacy should be observed in executing the most stringent powers of the statute. Prosecutions in the Sheriff Small-Debt Courts, which are specially authorised, will be much more economical, and less harsh, than instant apprehension of the offender, which is a mode of procedure better suited for dealing with graver offence .

H. B.

*Act.*—Peddie & Mackenzie, Perth : *alt.*—John Kemp, Perth.

The Tay Fishery Board, perceiving the weakness of their new Whittling Act, bethought themselves of again calling in Parliamentary aid. They lay on their oars for a considerable time—even until 1862. Then a new Salmon Fishery Act was passed by Parliament, bearing date 7th August, 1862, and under which they went to work as vigorously as of old to catch anglers as well as fish. A number of fish are enumerated in that statute which have no pretensions to royalty. Salmon is a royal fish—fishing for it can only, as a legal right, be conferred by a *special grant of the Crown*. Hence even the clause, *cum piscationibus*, in royal charters, is not held to convey a right of salmon fishing. Can as much be said for “ sea trout,” “ bull trout,” and “ parr ?” Before, however, describing in detail their new tactics, it is proper to show the estimation in which the Whittling Act was held by other fishing boards. This is seen by a law-suit, *Galbraith v. Shaw*, which proceeded before the



Sheriff-Substitute at Dunblane in the year 1858—that is no less than fourteen years after the passing of the Whitling Act, which, as already observed, is dated the 9th August, 1844. Well, Mr. Galbraith, as “clerk to the proprietors of the salmon fisheries in the river Forth and its branches,” presented a complaint against Andrew Shaw, labourer, residing near Woolmill, Dunblane, for having, “contrary to the provisions of the Act of Parliament of 9 Geo. IV., cap. 39, sec. 4, wilfully taken by some means in or from the river Allan, below and near to the railway bridge across the same, near the Cathedral of Dunblane, and county of Perth; or there wilfully had in his possession, on Thursday, the 1st day of October, 1857, certain smolts, or fry of salmon, or other fish of the salmon kind.” Here, it will be seen, the Whitling Act is entirely passed over. It is shunned, apparently, for its inefficacy, and resort is had to the old statute, 9 Geo. IV., cap. 39. The report of Galbraith’s case here inserted is very complete, and the proof led in the action is given at length, to show how dangerous it is for Parliament to be every now and then adding this fish and the next fish to *penal* statutes to gratify the whim of a few avaricious speculative zealots. An Act which will protect the *salmo salar* when in season and when out of season, and the true young of that fish, is all that can reasonably be asked, and all that should be conceded.

The name “parr,” in the new Act of Parliament, is calculated to mislead, in as far as there are more than one kind of parr. There are true parr, and trout parr. In the old statute of 9 Geo. IV., cap. 39, the true young of the salmon are designated as “fry” and “smolts;” the first term apparently used because the true young of the salmon,

in early age, are gregarious in their habits, keeping altogether in a body; and the second term seems to be adopted to distinguish them when they put on a white or silvery coating, at a more advanced stage of their existence, which covering entirely disappears as they get older, and make their appearance in Lunan Bay.

As long as the controversy was confined to newspapers and periodicals, the lieges could suffer no injury in their persons or property; but the aspect of things is totally changed when penal statutes come into play against them. Englishmen, Irishmen, Americans, and tourists from the Continent, all occasionally ply their rods in Scotch streams, and may be suddenly seized by river watchmen, and policemen, for having these small fish called parrs in their possession, and be subjected to fines and imprisonment.

The following lawsuit of *Galbraith v. Shaw* will be found to contain some curious information about the Stormontfield Pond and its influence in swaying the minds of people as to parr.

#### GALBRAITH *v.* SHAW.

DUNBLAINE, *20th January, 1858*.—Having heard evidence in support of the complaint and defence, and heard parties thereon—Finds it not proved that the defender had, time and place libelled, wilfully taken from the river Allan, or then wilfully had in his possession, any smolts or fry salmon, or other fish of the salmon kind; Therefore assoilzies him from the conclusion of the complaint: Finds the complainer liable to the defender in five pounds of costs, for which, with the expenses of extract, decerns.

JOHN GRAHAME.

*Note*.—The present case has arisen under the 4th section of the Act of 9 Geo. IV., cap. 89, which is one of what may be termed

"The Salmon Protection Acts." The complaint, which is made by the complainer, not at his private instance, but in his character of "Clerk to the proprietors of the salmon fisheries in the river Forth and its branches," sets forth that, contrary to the provisions of the statute, the defender had wilfully taken, by some means, in or from the river Allan, below and near to the railway bridge across the river, near the Cathedral of Dunblane, in the parish of Dunblane, and county of Perth, or then willfully had in his possession, on Thursday the 1st day of October, 1857, certain smolts or fry of salmon, or rather "fish of the salmon kind."

To this complaint the defender had set up a twofold defence—*First*, That the fish he had then taken from the river Allan, and had in his possession, were not "fish of the salmon kind," but fish of an altogether different species: and *Secondly*, That even admitting that the fish in question should be established by the complainer's proof to have been "of the salmon kind," the defender's ignorance of that fact, and his consequent *bona fides*, entitle him, in the circumstances of this case, to be assoilzied from the penal conclusion of the complaint.

The questions, therefore, which the Sheriff-Substitute is now asked to determine are, whether the complainer has proved beyond a doubt that the said fish were really "of the salmon kind," and whether the defender was aware, or must legally be presumed to have been aware, of this fact when the fish were taken by him, or found in his possession. It is not enough, in such a case as the present—which is laid upon a penal statute—that the complainer should prove that his view is more probably correct than that of the defender. He must do more. His proof must be such as both to exclude all possibility of any doubt as to the soundness of his conclusions, and to establish a legal obligation on the part of the defender to have been aware of their soundness. This is a case in which the legal maxim *ignorantia juris neminem excusat* has no force. That maxim is applicable only to cases in which a plea is attempted to be founded upon ignorance of the legal consequence of certain admitted facts, and it has no application to cases in which not the inference to be drawn from the facts, but the alleged facts themselves, are of a doubtful character. The maxim is one, on which the complainer would have been entitled to found, had the defender pled mere ignorance of the legal consequences of fishing for, or having in his possession, "fish of the salmon kind." This, however, is not what he now pleads; but he states as his defence (and it is a

relevant one), not only that he was ignorant, but that in the circumstances he was legally entitled to be ignorant, of the said fish being "of the salmon kind." The plea thus raised is preliminary to any question as to the real merits of the case. By this plea, the defender, assuming the truth of the complainer's allegations as to the true character of the fish in question, undertakes the obligation of proving that his ignorance of their alleged true character was such as was natural and lawful to him under the circumstances, and that all idea of any *mala fides* on his part being thus excluded, he cannot be held to have brought himself under the application of the penal sanctions of the statute. To the consideration of this plea, therefore, the Sheriff-Substitute will now proceed. It affords, he thinks, a sufficient ground for the decision of the present case, and moreover, relieves him of the very onerous obligation of determining the absolute truth of the respective views advanced by the complainer and defender as to the true character of the fish in question.

Although the merits of what may be called the different parr theories have been very fully investigated, and ably discussed by the agents for the parties in the present case, the Sheriff-Substitute thinks that such questions are very inappropriate for discussion in a Sheriff Small-Debt Court, or before any legal tribunal. The decision of such questions is more proper to the professorial chair than the judicial bench. It is not the province of any judge to decide a pure question of natural history, and legal tribunals have always been very jealous of entertaining such questions. Upon this point the Sheriff-Substitute cannot do better than refer to what was stated in a note to a decision of Sheriff Barclay, at Perth, in April, 1844, in a case kindred to the present, and founded upon the third section of the same statute as that on which the present complaint is laid. In that case penal conclusions were urged against a party in respect of his having, in the river Earn, been fishing for, and taken therefrom, the fish called the whitling, and which fish, though not specially mentioned in the Act, was yet alleged by the complainer to be comprehended under the general expression, "fish of the salmon kind." The learned Sheriff-Substitute, in that case, refused to give weight to mere scientific evidence as to the true character of the whitling, stating that "the Act of Parliament was intended to be read popularly, and not scientifically, nor to teach natural history. What may be popularly and notoriously held to be of the salmon kind, may have the protection of the statute under the general words of the

law; but the Sheriff-Substitute cannot lend himself to countenance *ex post facto* law—first establishing, by proof, that the fact complained of is an offence, and punishing the party for that act done before such ascertainment. It may be well to give public instruction in natural history, but tuition under the infliction of fine and imprisonment is not the most likely to be productive of public advantage.” It may be well to add that, since the judgment now referred to was pronounced, there has been passed an Act—the 7 & 8 Vict., cap. 95—in which the whitling is specifically mentioned as entitled to the protection afforded by law to the other recognised “fish of the salmon kind.” If the complainer has full confidence in the truth of his view as to the character of the parr, his proper course is to apply for an Act in which the parr shall be expressly included. If he does not feel himself in a position to render it probable that such an application would be successful, he is still less in a position in which he can cherish any legitimate hope of succeeding in his present action.

The complainer cannot pretend that it was the intention of the Act on which he founds, at the time of its enactment, to include the fish called parr as a “fish of the salmon kind.” In none of the numerous and very severe Scotch Acts passed for the protection of salmon previously to the passing of the 9 Geo. IV., cap. 39, has the Sheriff-Substitute been able to find any reference whatever to the parr as being a “fish of the salmon kind,” and at the date of the passing of that statute there was certainly no general opinion favourable to the identity in species of the parr and the salmon. *Most of the witnesses whom the complainer himself called to support his view of the true character of these fish, stated that the origin of their opinions dated no farther back than the date of the first Stormontfield pond experiments, four years ago, and that, previously to that date, their opinion had been that the fish called a parr was not a “fish of the salmon kind,” but a fish of an altogether different species.* The year 1839 is the earliest date at which, according to the evidence adduced in the present case, there was any decided expression of opinion as to the parr being a “fish of the salmon kind.” In that year there was communicated to the Royal Society of Edinburgh, a treatise, by Mr. Shaw of Drumlanrig, entitled, *Account of Experimental Observations on the Development and Growth of Salmon Fry, from the Extrusion of the Ova to the Age of Two Years*; and in this treatise the identity in species of the salmon and the parr was announced by Mr. Shaw as having been, if not

then for the first time discovered, at least for the first time then clearly proved and demonstrated. But whatever may be the truth of the conclusions arrived at by Mr. Shaw, their announcement by him does not appear to have led to anything approaching to that general unanimity of sentiment, the proved non-existence of which affords the defender a good ground of defence in the present action. However correct the conclusions of Mr. Shaw may be assumed to be, the evidence led by the defender has proved that in many, if not all, of the more popular works on natural history which allude to the parr question, and to which a person in the defender's circumstances may naturally be supposed to have the most easy access, the opposite opinion is most distinctly stated. The supporters of Mr. Shaw's views have, in the present case, been chiefly referred to by the complainer as having given expression to their opinions in some learned articles in the *Encyclopædia Britannica* and *Quarterly Review*, and the necessity under which the complainer evidently felt himself laid, in his argument at the debate, of so largely, if not exclusively, referring to and quoting from these and similar works, affords a strong presumption against the conclusion prayed for in his present complaint. The defender is, by a strong but necessary fiction of law, presumed to be acquainted with all the statute law of his country ; but it would be going rather too far to presume his knowledge of the experiments detailed, and his belief in the opinions put forth in the *Transactions of the Royal Society*, the *Encyclopædia Britannica*, or the *Quarterly Review*.

The defender must naturally be presumed to be more familiar with the experiments which have been made, or are now making, at the Stormontfield ponds, than with those made by Mr. Shaw, of Drumlanrig ; but still the Sheriff-Substitute does not, in the evidence led by the complainer in support of the trustworthy and decisive character of these experiments at Stormontfield, find a sufficient ground for giving effect to the conclusion of the present complaint. He has, however, to express the hope that, in these or some similar experiments, there will yet be found a complete solution of the difficulties that lie in the way of a generally recognised settlement of the parr controversy. In the meantime, he cannot hold that the circumstances of this case, arising, as they have been proved to have done, from the justifiable ignorance or scepticism of the defender as to the truth of what the complainer alleges to be the true parr theory, afford a sufficient reason for the infliction of any penalty whatever.

J. G.

*Act.*—William Galbraith ; *alt.*—John Maclean.

## NOTES OF EVIDENCE.

IN CAUSA.

GALBRAITH against SHAW.

*PURSUER'S PROOF—FIRST DAY.*

JAMES MATHIE,—I am superintendent on the Forth and its branches. The river Allan is one of its branches. On the 1st October I was on the Allan near Dunblane. It was a Thursday. A man named Henderson was with me. Near the railway bridge I saw the defender fishing with a rod and line. I asked to see what fish he had, and he showed me some, among which were twenty parrs. I am sure that they were parrs. I consider the parrs are the fry of salmon, and believe they are the produce of the first year. The parr is the first stage of the fish after the depositing of the ova. Parrs sometimes remain more than a year in the river after they are hatched. They then become smolt, with a silvery skin, and in that state descend to the sea. When a smolt is stripped of his scales, it is a parr below. November and December are the usual times of salmon spawning. The ova remain four months, and then parr is produced. This generally takes place about April or May. Since 1st October I have seen parr taken out of the Allan near the railway bridge. I produce some so taken; they are the same kind of fish as I found in defender's pockets.

*Cross-examined.*—I am a watcher on the Allan, and in the pay of the pursuer. I am paid wages at so much the season. I get nothing for catching poachers. I brought the fish that I took from the defender home, and gave them away. I showed them to my son, but to no other person so far as I remember. I did not cut up any of them. Along with the parr I took from the defender, were one or two yellow trouts. My reason for saying that the fish I got were parr is, that parr are got where salmon have access to. I know the Castle of Kilbryde. I do not know that smolts have been got above the rock at Kilbryde Castle. I have ripped up a parr, and have found both milt and roe. It is considered that the male parr has mature milt. I know that the spawn remains four months. This I know from examining a bed of spawn. I know that the parr continue a year after being hatched, from what I saw at Stormontfield. The parr there

were in ponds, and I have found there that the parr became a smolt the year following. Parr have never been got in the salmon fishing nets in the river Forth. I can't say that the smolts I saw at Stormontfield were the same parr I had seen the previous year. I examined the Stormont ponds carefully. The inlet to the ponds is very small, but I can't tell whether parr could get through or not. I can't tell from the size of the parr how old it is. The parr becomes a smolt about March or April. I can't swear that the parr I have produced are one, two, three, four or five years old. I now open one of the parr produced, and find no milt; I therefore conclude it is a female parr. I find no roe in it. I open another. I think it is a female also, for it has no milt. I can't, by looking at them, say that any of the fish produced are male fish. I have seen parr with the milt. I have not seen the female parr with spawn at all. The male parr will spawn, or, as I mean, have milt the first year of its existence. I don't think the female parr spawns the first year. I am not much acquainted with parr. I am not a parr killer. I know that in the river Allan parrs are now coming up in thousands, but they do not come from the Forth. They are travelling backwards and forwards. I can't swear upon my own knowledge that parrs ever go to sea. I mean to say they do not go to sea as parr. I have seen smolts go to sea in shoals. I won't swear that I ever saw parr going down with them. I have have often stripped a smolt of its scales, and found a parr below. I can't tell the age of any smolt I saw experimented upon, but I think I have made the experiment in the month of May. I can't tell how long is the existence of a smolt. It comes back the same year from the sea as grilse or trout. I can't positively say it was the month of May I made the experiment. It was not in November or October. I have seen smolts very small—as small as any of the parr now produced. I don't know that the mouth of the smolt is very tender, or more so than the mouth of the parr. When the smolt goes to sea it is from three to four inches in size. I know nothing about the anatomy of the salmon.

*Re-examined for Pursuer.*—Smolts are of different sizes, like trouts and grilse. Smolts return as grilse or trouts the first year, but they do not return as salmon the first year. Wherever salmon are got, parr and smolts are likely to be found. I am a practical fisher. I know that smolts are found in the salmon fishing nets in the Forth, but I never saw parr there, and therefore I conclude that parr do not go down as far to the sea. The inlet to the ponds at Stormontfield is from the lade, and the water goes through a



filter. About April or May, smolts go down the Allan in great quantities, but I never see parr going down. Parrs are in the river at that time in great quantities. The river Forth is not a spawning river till above Gartmore. The Teith and Allan are spawning rivers.

*Re-examined for Defender.*—I have often stripped smolts. The scales did not in all cases come off equally easy. I am sure that some of the smolts so experimented on appeared parr below. They had all the marks of a parr. I can't say that the smolts so experimented on were not two years old. I can't say what was the age of the smolts, but I know they were one year, because they can't be smolts till they are a year old. I never saw smolts and parrs mingling together in the river. I do not think that parr ever get higher than salmon; but wherever salmon spawn, parr are likely to be found. The laide into Stormontfield pond comes off the Tay. Salmon eat parr, and take it as bait.

JAMES HENDERSON.—I am one of the watchers on the Forth and Allan, and have been so for many years. I was with Mathie on 1st October. I was with him when the defender was found fishing. I am sure twenty parrs were taken from him. Yesterday I saw fish taken from the same place. Those now shown to me are like those I then saw taken, and they have the same appearance as those taken from defender.

*Cross-examined.*—It was James King who caught the fish yesterday. I was with him at the time. Mathie took them away. Those now shown to me are parr.

THOMAS RUTHERFORD.—I am water bailie on the Tay. I have been twelve years in the situation. I am well acquainted with the habits of salmon, having been a fisher from sixteen years of age. The fish now shown to me are salmon parr. Fish spawn in November. The period between the depositing of the ova and the coming out of the fish is 130 days. They are then small parr, with the egg about them. They remain so six weeks, and then begin to feed. They vary in size. Sometimes they continue two years as parr, sometimes one year. They do not go to sea as smolts till about April or May—they then get their silver coat. If that coat is rubbed off, the parr appears below. I never saw any parr going to the sea. Sometimes the smolts return as grilse in seven weeks, four pounds in weight. This is the earliest return I know of. They never return as salmon the first year. I have seen them return as grilse the second year. I formerly held the opinion that parr and smolts were different fish. I changed my opinion four

years ago. My experience of the ponds caused me to change my opinion. The water of the pond is all filtered, and no fish can come in. There are also small zinc sieves. What is produced in these ponds is from the ova of salmon and grilse. The produce in the first stage was parr. Before the first year was over there were no smolts in the ponds. I have no doubt the fish shown to me were parr.

*Cross-examined.*—The peculiar marks of the parr are cross bars on both sides of the body, and a black spot on each side of the gills. They have not always the same number of marks—at least I don't know. I can't tell the usual number of such marks. I never counted them. Fish get into the sea from the Stormont ponds, but no fish can get up. The opening is made for a few minutes at a time to let the fish out. It is quite impossible other fish could get into the pond. A number of the parr were marked when they became smolts, and we got some of them back. Parrs have been marked, but we never get these in the same year except as parr. We have got back marked smolts in the same year. We mark the fish by cutting the fin. The fin of a fish does not grow. I can't say whether fish are marked in other places. It was generally believed that the fish we got back were the fish we marked. I don't think that they were other fish. We have got a marked fish seven weeks after it went to sea. It was caught in the river three miles below Perth. This was in fresh water. Some of the marked fish have been found in salt water, near Montrose; they were grilse; we believe them to be fish of our breeding. Some people attempted to cheat us. Our mark was known, and a reward offered. A good many fish, not ours, were marked as a trick and sent to us. We knew, from the mark on the fin being fresh, that it was a trick. Salt water kills parr. I never saw a parr older than two years. I can't tell the age of the parr now shown to me. I can't tell the sex. I never saw roe to any size in a parr. The male parr spawns; that is, it has milt. I don't think spawn could get through the filter at Stormontfield pond. I have known a salmon take smolt as bait. I know that parr is used as bait.

PETER MARSHALL.—I have charge of the breeding ponds at Stormontfield. Filtered water is put into the beds of the ponds, and ova was deposited on gravel. The ova was put in in November, 1853. In 130 days the ova first produced a little fish, with a bag attached. (Witness here exhibited specimens of fish in the different stages of production.) In six weeks the fish began to

feed. In three months they increased into the parr state, and in fourteen months, or two years, became smolts. When the scales are removed from the smolt, a parr appears. I have no doubt the fish now shown to me are parrs. The male parr has a milt, but the female never produces till she goes to sea. Upon examining two of the fishes now shown to me, I find one a male and the other a female. Before any fish got out of the ponds, fourteen months had elapsed, and by that time some had got silver scales. There were then thousands of parr remaining. In the spring following, the remainder became smolts, and went to sea. We marked a number of smolts every year, and forty-two returned to the river the first year. When the fish were allowed to get out, I watched, and it was impossible for any other fish to get in. The ova originally put into the pond was from salmon. Nothing but the ova and milt of salmon got into the pond. We are careful in not allowing any of the ova of trout to get in. We have been experimenting for three seasons. The gravel put into the pond was taken from the bed of the river Tay. Being shown one of the fish produced; it is not above twenty months old. The marks of a parr are finger marks. The number of marks vary. I have found eleven, and I have found sixteen. The parrs thus observed were of the same ages. The number of marks does not depend upon the size. I can give no reason for difference in the number of marks. I am sure that the fish with eleven marks was of the same age as the fish with sixteen. I never saw parr with fewer than eleven. I have never seen parr taken from any river but the Tay. The Tay parr are from four to six inches. I have never seen a larger parr than one of those now produced. I know that fish very like parr are found in other rivers. For example, the parr of trout; It has the dead fin orange; the rudder fin is white at the bottom and yellow at the top; there is no peculiarity about the other fins. They have not so many bar marks as the parr. I do not think they have ever more than six marks.

*Cross-examined.*—The gravel in the ponds was taken from the river within 300 yards of the ponds. The water there is fresh. The second year the pond was emptied altogether, and the whole fish were then out of it. The bottom of the pond was cleaned out, and new stones put in. The pond was dry for a fortnight. There were a few parr then let out. The parrs and smolts associated together in the pond. 1292 were marked the first season. It was not kept secret. A reward of five shillings was offered.

The reward was advertised in the Perth papers. Fish were brought with spurious marks. I am aware only of one case. The pond was opened on the 14th April—never later than May. Supposing a fish caught in May, after being let out of the pond, and marked, I could not say whether it had been marked by me or not, if afterwards brought back. The pond is about a quarter of an acre in size, and open to the public. It is quite impossible, I think, that young parr could have been thrown into the pond. The pond is not watched night and day. The second year we marked the fish; in addition to cutting the dead fin, we cut the tail. We got fish back with both of these marks. The first year we got some back in about two months with the dead fin mark. The second year we got back fish marked only with the dead fin mark. The first year's fish got back was five-and-a-half pounds in weight. No fish that left the pond was a pound in weight. The second year's fish were a little larger than the first year's when marked. They came back of various sizes, being five pounds and upwards. Some of these fish were produce of first year's spawn. I can't account for the difference of the rapidity of growth of some of the fish brought back in the first year, as compared with some of those brought back the second year. These being fish of the same spawn, we did not mark the fish as parrs. The reward was offered at the time of the marking of the fish. When the pond was cleaned out, there were some smolts in it. The gravel in the ponds was quite pure. It was twice shovelled; there could be no ova among it. Before 1853 I had no experience of parr. The spawn of a fish like the parr could not be mixed with the gravel. Whatever was put into the pond went out as smolts except in the case of a few cases where the parr escaped. I never understood that parr went to sea and came up as salmon.

### *SECOND DAY'S PROOF.*

**WILLIAM MATHIE.**—I am a watchman on the Teith, at Cambuskenneth. Caught some parrs in the Teith yesterday, along with James Henderson.

*Cross-examined.*—We caught more than we brought here. My reason for not bringing more than these was that I did not think they would be required. I have no other reason. I never caught any parr in the Allan. Have seen parr that were caught in the Allan. Could not tell exactly how large I have seen the Allan

parr. I can't say these are salmon. I know that the Teith salmon are larger than those caught in the Allan. These parr were caught near the Mill of Torr. Never saw them spawning in the Teith.

JAMES HENDERSON.—(By Mr. Mc'LEAN.)—I heard the former witness examined. I remember the substance of his evidence. I heard the Sheriff tell all the witnesses to leave the court. I went along with Mathie to get some parr; he said they were to be taken to the Court. I was asked to come here to-day.

DAVID HUNTER.—I am a watchman on the Allan. I was instructed to get some parr out of the Allan, and went along with some other parties, and got what I now produce.

*Cross-examined.*—I got part in the Knaick and part in the Allan. I am a watchman on the Allan; so is William Mathie. We are joint tacksmen—having the net fishing in the Borough Meadow, below Stirling, on the Forth.

THOMAS GLEN.—(By Mr. Mc'LEAN.)—Heard the former witness examined. Heard the Sheriff tell all the witnesses to leave the Court. Did not know I was to be examined. I came just to hear the case tried. I never was asked any question about the case. I am a watcher on the Allan—sometimes through the night as well as through the day. All the watchers are here to-day.

By Mr. GALBRAITH.—I went along with D. Hunter to catch parr in the Knaick and Allan. Hunter brought away the fish.

*Cross-examined.*—Those from the Allan were caught in the stream a little above the Laighill. I was on the bank, a bit from Hunter, and I did not catch any of the fish. I did not see Hunter catching any of them. I was out a good part of the day. I did not see Hunter throw away any of the fish. We fished up to above the first railway bridge. I did not see Hunter take any fish out of the Knaick. Saw these fish caught by James King. There were three of us together—Hunter, King, and I. I saw King take four or five out of the Allan. We fished up the Knaick to above the Mill of Ardoch. Could not say there was any difference between the Allan fish and those of the Knaick. I could not swear they are parr we caught in the Allan or the Knaick.

JAMES GREENHORN.—I have been connected with the fishings on the Forth and Allan for the last ten years, and am at present a joint tacksman on the Longrank, below Stirling, and also on the Keir fishings. I have fished since I was a boy, and have paid a good deal of attention to it. I understand a smolt

is a parr. While a smolt, there is no appearance of a parr; but when the silvery scale is rubbed off it has. I have seen smolts from March till June. They disappear completely after that. They go down the river. I have seen grilse on the last Friday in May. No dependence can be placed on the grilse appearing till July. Grilse I consider to be in connection with the salmon. I am satisfied that, when going down, they are going to the sea. I have seen them in thousands, at the cribs at Craigforth, during a drought. They were in a confined pool, where they could not get through. They disappeared the first fresh that came. The first grilse that appear in the river, is the fry that went down. I am satisfied, in my own opinion, that the fry going down return grilse. The fish I saw at the cribs, about six years ago, I am sure were grilse. There were in these pools both trouts and parr. In some pools plenty of fry are to be got. In pools near the spawning beds there are parr to be got (I allude to smolts here). There is not a pool or stream on the Teith where parr are not (I confine myself to smolts). Every pool at a certain time has parr. I have stripped the scales off a smolt, and am perfectly satisfied it was a parr. I hold this as applicable to all the smolts I have seen. It is my opinion that parrs are the fry of salmon. They assume the silvery scale when they go down the river. I have seen kelts taking on the same silvery coat, at repeated times, in the end of March and April, preparing to descend the river; but, before this, I have seen them of a different colour. I have examined the process at the Stormontfield pond. I went to the pond to learn what I could of the process, and now proceed to tell what I myself observed. In the second year of the experiment, in the breeding boxes, I saw the spawn that was deposited the fall previous to that. It would be about the end of March. I could discern only a few; they were very small. Below these boxes was the pond, abounding with little fish in thousands. The keeper scattered food over the pond, so that I saw them move distinctly. I hooked one, and to my satisfaction it was a parr. In that same pond there were fish from one-and-a-half to five inches, all to appearance parr. (Shown some in a box). These are parr. (Shown another lot). I consider these all parr except one (one of Hunter's catching). I have opened and examined parr. I could distinguish male and female. The milt in the male was very distinct; in the female very indistinct. The male I have seen, but not generally, very full of milt.

*Cross-examined.*—I have been interested in the fishing for twenty years now. I was living on the Teith side, and have caught smolt. Never got parr or smolt in the close season. My experience consists only of what I saw in the open season, from February till September. I have stripped, perhaps, half-a-dozen smolts altogether. When I did so, to my own satisfaction I found parr below. I neither counted the bars nor black spots on the parr. I made no further investigation. I can say no more as to its being a parr. I don't know how many kinds of parr there are. There are three kinds of trout ascend the river—the salmon, the sea, and the bull trout (which is not a common sea trout, or salmon). There is also the hirling, which I suppose to be the young of the common trout. Don't know there are three kinds of parr. Don't know that there is more than one kind. Never saw the young of the hirling, the sea, or the bull trout. I have taken three smolts out of a perch. I don't know that salmon prey upon parr, but have no doubt they do so. The salmon prey upon the garvie. Parrs become scarce and small after the smolts go down. I never knew parr descending or ascending the river. In the pool at Craigforth I saw nothing but smolts. I saw them for three weeks. I saw no particular difference on them during that time. The distinguishing marks of a parr are the bar marks. I don't remember the number of these. I never compared the fins or the bars of the smolt. My evidence here given as to my distinguishing the parr, is by the bar marks wholly. At the end of October or December I have seen parr with roe. I have distinguished roe in the female. The male parr's was farther advanced. It was scarcely visible in the female,—not a hundreth part in comparison to the male. Comparing the roe in the salmon and that in the parr, it was not near so large in the parr as in the salmon. It was an ordinary sized parr I experimented on. Salmon come up the Teith from five and a half pounds, the smallest, and forty-six and a half pounds, the largest. (Shown the parrs produced by former witnesses.) I think the first lot are all parrs. The second lot also, except one, which differs from the others in the bars and the fin. The bars are not shown on that one as on the parr. The dead fin is more red or bloodshot than on the parr. Another mark I distinguish by is the predominating mark on the gill. It is also stiffer than the other fish there, which I take as another mark. I have never seen so many parr after the season as I now see. I could not say the female parr becomes foul. I say the smaller parrs there are the youngest, from what I saw at Stormontfield

pond. The parr in the Teith, I have heard, are smaller than those in the Allan. The salmon found in the Teith are larger than those of the Allan. The smolt's mouth is very tender. Can't say it is more so than the parr's. I can make no distinction of the tenderness of the mouth in the hooking of them. I visited the Stormontfield ponds the second year after they were opened, in March or April. The nursing pond is fed from a lade. Could not say where it comes from. I was told it was from the Tay. The water did not appear to be filtered. I took only one parr out of the pond. I handled no more of them. The pond might be seven feet deep. Can't say there were any other fish in that pond. Could not swear to any of the other fish in that pond being parr, but the one I took. I never knew a fish I have seen as a parr coming back as grilse. Have found parrs in the rivers all the open season. Never saw parrs spawning. Never examined the bones, or anything else.

*Re-examined.*—I understand the sea trout, the bull trout, &c., to be fish of the salmon kind. Never saw parr going down in shoals. I have never seen smolts going up the Allan or the Teith in shoals. I examined parrs in August and September. In the female I found the chain where the roe is scarcely visible. In the male it was perfectly developed. The parrs on the table are a proper specimen of the parrs in both rivers.

*Cross-examined.*—The roe came out of the male when I pressed it, but not the females. I distinctly state that I do not know a male from a female in the parr. I know of no distinguishing feature between the bull trout and the proper salmon. Can't say parr remain more than one year in the river before they are smolts.

PETER MARSHALL.—Since I was here last court day, I have caught some parr in the Tay and Stormontfield pond. I produce them,—the large ones from the pond, and the other two from the Tay. (Shown Mathie's fish). They are all parrs, and Hunter's lot also, except one, which is a trout. I distinguish it by the rudder fin. The rudder fin of the parr is yellow. The dead fin in the trout is always orange; in the parr it is generally dark. These are special marks. The water in the pond comes from the lade, and originally from the Tay. It is possible the water can get to us without bringing fish with it. I believe nothing but water comes into the pond. Every provision is made, by perforated zinc, &c., to keep everything out but water. I produce a bottle containing a parr of twelve and one of twenty months, and a trout and a smolt two years old, ready to go to sea. A fish like this, covered with



these scales, does not remain in the river, but goes to sea. Parrs remain in the pond more than one year sometimes.

*Cross-examined.*—It is by comparing the one lot on the table by the other, that I can say they are the young of salmon. I can't say these in the tin box are the same age as those I brought with me. I have seen them larger in the Tay than my two. We have them in the pond as large as the one in the bottle, which is from the pond. I can see eight bar marks on the small trout on the table. There is no difference in the marks on the trout and the parr. The salmon never gets these spots which the trout has. Can't say whether the trout or the parr is oldest. The smolt in the bottle I have kept for a year past. The trout in the bottle is not the same kind of trout as the one in my hand. There are, to my knowledge, three kinds of trout in the Tay. My whole experience is in connection with the Tay. I never caught or saw any fish caught in the Allan. We have many visitors at the pond. I often show how the sluice works. There may be half-a-dozen inches of water free at the bottom. I lift the sluice during both spawning and breeding time, to all the visitors who ask.

*Re-examined.*—The breeding boxes have a filtering pond, which prevents anything getting in but water. The filter is composed of sand. We have not so large parr on the Tay as these on the table from the Allan, which I think is owing to the feeding being better on the Allan than the Tay. The longest time they continue in the pond is two years. Some of them go sooner. We opened the pond at the end of two years and let them out. The Tay is heavy, and has a strong current. The Allan is more streamy, with pools.

*Cross-examined.*—(Shown two of the fish). Can't say which is oldest. Can't say the little one is five years old. Can't swear to the age of the two from the Tay. The one from the pond is twenty months old. I put it in, and kept a note of the date in a book. I watched the eggs, and I thus know its age. The salmon feed on worms and flies. My opinion as to the one fish being better fed than the other, is because it is fatter. I never had a fish more than two years old under my eye. There are no filtering beds leading to our nursery pond. The bed of gravel is about a stone thick. I have never seen any inclination in the fish to come out of the pond without spawning. I can't say the young of the salmon and the trout associate promiscuously.

CHARLES F. WALSH. Perth.—I am a gunmaker in Perth, and sell fishing tackle. I have taken a great interest for fifteen or

sixteen years in the propagation of salmon, and in what is going on at the Stormontfield ponds, from their commencement. I have seen the whole process of spawning. It was the spawn of salmon and grilse that was put into the boxes. The water was let in through a filtering box, so that no foreign matter could get in. They may hatch in forty days, but it is generally 140 days there. They hide sometimes among the stones in the breeding boxes, and then go down to the pond. Some go down to the river when they are thirteen months old, and some at two years. Some of them remain another year. When they go out they are covered with a silvery scale. They go about the same time as the smolts in the river; they go in shoals. I am satisfied these parrs are all salmon. I am not aware of smolts being in the river at this time, but there are plenty of parrs. The size of the fish does not show the age. I have seen a fish one ounce in weight, and one sixteen pounds, both the same age. (Shown Mathie's fish). These are all salmon fry, and also Hunter's lot, except one, which is a yellow trout.

*Cross-examined.*—My observations are almost confined to the Tay and its tributaries. My experiments with respect to salmon and grilse are confined to the Stormontfield ponds. Much of the spawn deposited there I did not see. I knew them to remain there two years. They would have remained longer had they been allowed. I never saw parr going up and down in large quantities. We had a mark on the fish of one ounce, and the one of sixteen pounds, and thus knew them to be of the same age. The dead fin was cut off. I know there were some fish brought to Stormontfield, and attempted to be passed as the marked fish. I know that a great many people about Perth knew the fish were marked. I did not know of a premium being offered. I am aware that fish sometimes lose their fin without it being cut off. My opinion is that they are parrs before they are smolts. I know that the male parr has a milt. The mouth of the smolt, I think, is more tender than that of the parr. I used to watch the habits of the yellow trout, which are very different from the salmon.

*Re-examined.*—The mouth of the kelt is twice as tough as that of the smolt. The kelt, when going down, puts on a silvery scale.

*DEFENDER'S PROOF.*

JOHN BAYNE, builder, Dunblane.—I have been in Dunblane all my lifetime, and have been a fisher for thirty or thirty-five years. I am forty-two years of age. I have fished in the Allan for the last thirty years, and have taken both parr and smolt. I have seen the parr on spawning beds with salmon and grilse. I have found parr during the whole season. I have seen them running up in large numbers with the grilse. I have examined the parrs particularly, Don't think that parr and grilse are the same. My reasons for thinking so are these:—I find the parr is not of the same make as the grilse—the parr is larger in the head; the parr's fin is yellow—the smolt's is bluish. I never cut up smolts, but have cut up both male and female parr. I found roe in the female, and milt in the male. The roe in the female could scarcely be discerned with the naked eye. The roe in the parr appears to be as large in proportion as in the full-sized salmon. The smolt's head is longer than the parr's; its mouth is also much more tender than the parr's. I have observed that, during the spawning season, the parr gets quite black. I have stripped the scales off the smolt, but never found it to be a parr. They have no appearance of the parr. I have been once at the Stormontfield ponds, and examined them minutely. The keeper showed and described the whole process. The nursing pond was supplied from a mill lade, which came from the Tay. There is a sluice with perforated zinc about one-twelfth of an inch wide. This would admit about nine or ten of the ova of the parr at a time. The water went down dirty. I looked at the nursing pond. The keeper threw in some meat, and I saw the fish. Don't know what kind of fish they were. He said there were other kinds of fish than the salmon kind. He also said he could not keep them out. I observed the fish to be different. I would say that the fish in it could have produced as much ova as would fill it ten times. I think the perforation was large enough to let in ova. I have fished the Teith. The Allan parr are as large again as those of the Teith.

*Cross-examined.*—Hunter's lot of fish on the table are all parrs except one. I never saw parr spawning by themselves. The smallest parr I have seen would be about three inches. Have heard they were parr the first year. The keeper at the pond told me so. I saw parr alongside grilse and salmon in December and November. Have seen salmon fry; they are smolts. I never saw the young of the salmon till I saw the smolt. They will be from three to six

inches. Never observed the smolt till it was in the state for descending. I have seen the roe of a salmon. The ova would be one-eighth or one-sixteenth of an inch in diameter. The size of the ova of the yellow trout is in proportion to the size of the fish. I have seen the salmon in the spawning state. I never saw smolts coming up. I have never seen parr where salmon could not be. I think the spawning season is in October and November. The keeper at Stormontfield said there was no interruption between the stream and the feeding pond. They could get through although the perforation was as close again. The parrs I saw on the spawning bed were either eating the spawn or spawning themselves.

*Re-examined.*—I have seen salmon spawning in redd, but never in mud. If the ova of the parr got into the nursing pond, it would come to maturity the same as the others. I have seen the parr trout a quarter of a pound weight.

JAMES TODD, coal agent, Dunblane.—I visited Stormontfield ponds along with John Bayne on Friday last. The keeper showed us the ponds and the whole process. He lifted the sluice about a foot or so. There was nothing to prevent the water then getting down to the nursing pond. There is a considerable fall in the water between the sluice and the nursing pond. I could not say what sort of fishes they were in the ponds. The man said they were neither parr nor smolts. He said they were always where fresh water was, and that he could not keep them out.

JAMES BROWN, gardener, Dunblane.—I have been a fisher for forty-eight years. Have fished at all seasons of the year, close and open, night and day. I have taken twenty-two dozen fish out of Kilbryde Burn in a day. I have taken grilse, smolts, and salmon in all the burns. I have stripped the coat off the smolts. Never found a smolt with milt or roe. Have ripped up both parr and smolt. I have found milt and roe in the parr. The smolt is generally bluish green on the back, and thinner and longer in the head. The parr is of a reddish yellow in the fins; it appears to me to be older than the smolt; it is higher flavoured and firmer in the flesh than the smolt. I have eaten them both. The bar marks of a parr are more brilliant than the smolt's, and; I think more in number. It was generally about June before I caught parr. I have seen parrs spawning in Murdochford Burn which runs into Kilbryde, which runs into the Teith. I did not see salmon near them. I saw them about a fortnight ago along with Wm. Sharp and M'Donald, and have no doubt they were spawning. I have seen parr feeding greedily upon the spawn of the salmon.

The parr I got in the Teith are smaller than those of the Allan. I have killed three salmon or sea trout above the rocks of Kilbryde.

*Cross-examined.*—I killed the salmon or sea trout — one in August and two in the end of September. It will be twenty years since then. A parr is neither trout nor salmon. I did not examine whether the fish I saw were male or female. Could not tell this. From what I saw going along Kilbryde Burn I conclude they were spawning fish. I know that this fish is much softer at one season than another. The parr frequents the Allan, and are very ripe about June. I think they come up from the sea. Smolts go away from about the beginning till about the end of May. There are more parr just now than when they at first come up. Hunter's lot of fish on the table are all parr except one. Mathie's lot are different in the shape from any smolts I ever saw.

DAVID FERGUSON, Donne.—I have fished for fifty years in the Allan and Teith. I have caught a good many parrs both summer and winter. It is my opinion that they are fish prepared by God to feed the salmon. There is a different appearance between the smolt and the parr. The smolt's head is longer and smaller than the parr's. There are black spots on the parr which are not on the smolt. I have seen the roe in the parr. Have caught parr in the Teith, the Allan, and Kilbryde Burn. The Allan parrs are much larger than in the Teith. The parrs are plenty in all seasons. I have seen salmon taking parrs. Have seen parr spawning, and salmon spawning near them, and the salmon turning round and eating up the parr.

*Cross-examined.*—I have seen the male and female parr together, and believe they were spawning. The spawn of the parr is so small that the seed of Adam could not see them.

DAVID BAYNE, joiner, Dunblane.—I have been a fisher for twenty years. Have caught all the kinds of fish that come up the Allan. Have killed parr in the Allan with milt and roe in them. Have killed them in the kelt state in the Allan. I am quite satisfied that parr spawn. Can distinguish male from female. I have seen, caught, and examined smolts. The parr and the smolt appear to me to be a distinct species. I never found roe or milt in the smolt, but invariably in the parr. The parrs come up the Allan when the smolts go down. The parrs go down about the end of January again. Never found parr along with smolt. I have seen 130 dozen smolts caught or kepped going down at the Mill of Keir, and not a parr among them. They were kepped with a basket in below the fall at the bye-wash—55 dozen were caught the first night, and 75

dozen the second. It was in the end of April or beginning of May. I have stripped smolts often. It is barred the same as a parr, but differently shaped. I believe the yellow fin to be the young of the yellow trout. The flesh of the parr is whiter than the smolt's. The parr comes up for the first time in June, and continues till about this month (November). The minnow comes first, then the parr, then the sea trout, &c. I have seen smolts in a pool where they could not get down, and seen them about three weeks after about an inch and a-half longer. This was in summer. In April I have caught eight or ten dozen trouts, and found not more than eight or ten parr among them. The parrs get plenty in July and August. Smolts get plenty in the Allan about April, and continue till the end of May, if not wet weather. I have no doubt the parrs I caught in the Allan are a different fish from the smolt caught there, and I say this after careful examination.

*Cross-examined.*—The parr is a distinct species from the smolt. The smolts are of the salmon kind. The parrs breed in small streams where they get light water and small gravel. They will breed in the Allan. Never saw them depositing the spawn. I have seen the salmon spawning. I know the parr to be different from the smolt by the softness of the mouth. I have lost many smolts by their slipping off the hook, but very few of the parrs in that way. I caught two female parrs to-day, and found roe in them. I never saw parrs in shoals.

By the SHERIFF.—Can't say as to the history of the fish between the time of spawning and the putting on of the silvery coat. It was always my belief that the parr which came up came up from the sea side. I have seen them coming up from about a mile below the Mill of Keir. Have not seen them below Bridge of Allan. I think they go to sea, because I have seen parr coming back full and clear, which would scarcely be the case had they been in fresh water all the time.

JAMES CHRISTIE, Dunblane.—I was brought up within two or three hundred yards of the Teith. Remember seeing at the Isle of Cauty a number of parrs in an old water-run in the month of May. They remained there all summer and winter, and next summer till the end of August. I fed them regularly. I observed no difference on them all that time. Some person killed them with lint.

JAMES EASSON, Dunblane.—(By Mr. GALBRAITH).—I have not subscribed to the fund for defraying the expenses of the defender's case.

By Mr. M'LEAN.—I saw some fish taken out of the Allan on

Monday—three smolts or parrs. Took them to Bridge of Allan along with James Mason, and gave them to Dr. Paterson. These are the same as I took to Dr. Paterson.

*Cross-examined.*—Can't say whether they are parrs or smolts.

JAMES MASON.—Got three fish on Monday. James Easson put them into Dr. Paterson's hands.

*Cross-examined.*—James Bowman caught them. They were like these. Could not swear they were the same. The large one is not. James Easson gave two grilse to Dr. Paterson. Could swear by the length of them they were grilse. A sea trout is much smaller.

J. WINGATE JOHNSTONE, Deputy-Inspector of Hospitals, and presently residing at Bridge of Allan.—I am a physician. I, along with Dr. Paterson, made an anatomical examination of two grilse and three parrs. A male and a female grilse, and one of each sex of the parr. The spinal column of each grilse had fifty-six vertebrae. The parrs had fifty-nine. The bones were fully developed in both species. The bones of each fish appeared to be fully formed. Counted them in the fish, and also by placing the spinal bone between us and the light, and then after boiling the fish. The grilse would be about twelve and fourteen inches. They appeared to be different fish decidedly. I directed my attention to the organs of generation. The milt in the grilse was well expressed; as also in the parr—not to the same extent. It was seen with a microscope in the female. The milt in the male parr was pretty full. I consider the parr as fully arrived at maturity, as they had organs fit for producing. Dr. Paterson has one of the fishes. I believe it is the female parr. That is the fish we examined—at least it is very like it. I see the roe in it now. That is a fish capable of reproducing its species. I can't say exactly as to its age. A fish with a roe developed like this, will not show after the time of spawning. I would expect to find the organ, but not charged. The grilse's roe was within a few weeks of being ripe. The female parr's was smaller.

*Cross-examined.*—(Shown some fish). Can't say what they are. Could tell a cod from a salmon, but nothing more. I am no fisher. Don't know whether the other fish I saw were grilse or not. Don't know that the vertebrae in fishes is always the same. Can't say that in some fishes there are not more bones than in others. I have read *Fyfe's Comparative Anatomy*; it was a book of authority at one time, but we never look at it now. I was told the fish we examined were parr. It was a good stiff cartilage. In the larger fish, the

bones were decidedly stronger ; just as much difference as in the bones of a young and a grown-up person. It was from the vertebral column that I distinguished the fish. I hold this opinion notwithstanding what you have read from Fyfe. Bloomenbach is a very good authority ; but had I heard it from Knox of London, I would say it was gospel. *Bloomenbach* and *Cuvier* I hold to be works of authority at the present day. In the two fishes I examined, I can't say whether the milt or roe was largest, as I never examined a fish before. There was more appearance of milt than of roe in the small fishes. I took the microscope to look at the roe. My sight is not of the best, yet I saw the roe with the naked eye. I am ignorant of the natural history of salmon, or fish in general. I would not have known that these are not of the salmon kind unless I were told. I judge from the anatomy of the fish.

*Re-examined.*—I consider Dr. Knox the highest authority. (Read a part of Knox's book, *Fish and Fishing in the Lone Glens in Scotland*, pp. 88 and 89). Taking these two passages together, I think the colouring is not so decisive as the anatomical examination. (Read a passage from Dr. Parnell's work, p. 32). I should say by the spinal column is the most decisive way of judging. (Page 85).—I consider the difference in the vertebral column more decisive than this. (Page 87).—As to the spots, I would not consider them to be more decisive than the anatomical examination. (Page 118).—As to the specific character, I consider this more minute than the anatomical examination—at least I consider this very important. If I found fifty-six bones in one fish, and fifty-nine in another, I would say they were a different species.

By the SHERIFF.—The roe of the parr and the grilse appeared both to be matured. The roe of the female fish was larger than the milt of the male. The roe in the grilse was farther advanced than in the parr.

*Cross-examined.*—I don't know Parnell to be an authority. I have heard of him. I regard Knox, as an anatomical man, to be the highest authority.

*Re-examined.*—I count fifty-six vertebrae in the back bone of the grilse now handed to me. It is a similar bone to the one I examined at the Bridge of Allan. I found fifty-nine in the parr, along with Dr. Paterson, and left it with him.

Dr. PATERSON, Bridge of Allan.—(By Mr. GALBRAITH.)—I subscribed five shillings for this case. Never saw Mr. M'Lean before yesterday, nor the defender. Had no object in view when I gave the subscription—it was merely as an act of charity. I was not



asked to dissect the fish gratuitously. I was not asked my opinion when I subscribed.

(Mr. Galbraith here objected to Dr. Paterson appearing as a witness, but, after some discussion, he was allowed by the Sheriff.)

By Mr. M'LEAN.—I had two grilse and three parrs handed to me the other day. I now lay one of them on the table. I examined the vertebræ of it. That is the parr that Dr. Johnstone and I examined. We had a male and a female grilse. I dissected and found fifty-six vertebræ in both the grilse. We examined the fish, and then cut it up. We detached the spine of one, and counted the vertebræ; we then boiled the fish, and counted them separately. In the other one, we boiled the fish entirely, and found fifty-six in it also. In the parrs, both male and female, we found fifty-nine. The fish I produce is one of the parr. I can observe the roe with the naked eye. The bone I brought with me was the only one fit for evidence. I could not have given my evidence more distinct, although I had brought them all here. From what I know, I could not say the fish you show me is the young of salmon. Dr. Fyfe is now out of date. I would not appeal to him as an authority. I know that Dr. Knox is a great authority.

By the SHERIFF.—I am not aware there are different species of parr. In the parr and the grilse the general appearance was different. In the head, I find a great difference in the parr and the smolt. The parr's head is more of a bull head than the smolt's, and is also different from the head of the grilse. It is against all rule of nature to think that this difference would ever disappear. There was no perceptive difference in the heads of the parr.

*Cross-examined.*—The one grilse I examined was male, the other female. The milt of the male parr is the largest. It took us above three hours to make the examination. I cannot say the bones of some fishes have more vertebræ than others, but I know these have. I should hardly think that our examination should settle it as a general rule, but the deduction is that it would. I draw a conclusion from these premises as to a certain extent only—to an extent to be founded on these cases. I am perfectly certain they were grilse I examined. It never occurred to me that you might, for your satisfaction, wish to see the other bones which I threw away. I consider the vertebræ of the parr as tough as that of the grilse. I have heard of Shaw. I never saw a parr like that on the table assuming the appearance of a smolt. I have seen smolts. (A Report from the Royal Society of 1839, by Mr. Shaw, was now read). I am not prepared to differ from Mr. Shaw as to his saying the parr in

our rivers are the young of salmon. My idea is that this can neither be proved nor denied. I cannot say whether Shaw's report is true or not.

JAMES REOCH, labourer, Dunblane.—(Produced a grilse, and also some live fish in a can, which he took from the Allan to-day). These are Allan parr. They are nothing like smolts. The spawn of the smolt is like puddock pownies or heads. I never saw these turn into smolts. Never saw the young of parr. The puddock heads are the young of salmon. They appear about the beginning of March, or before that. There are not many seen after that. They don't turn into smolts all at once; they must have time to grow. The parrs are spawning just now. I fished often here when I was young; got them different sizes, and at different times in the year.

*Cross-examined.*—There are five parrs here with nine bars, and two with eight. They are all parrs, but vary in size; the largest is about five inches. Perhaps one of them may be five years of age. The smallest might be as old as the largest. I have seen smolts. Never saw parrs getting scales on. I say that parrs belong to the yellow trout. They are not its young. The male parr may go along with a female trout. I have seen them on the redd. Never saw female parrs on the redd. I can't distinguish between a male and a female parr. Never saw the produce of a male parr and a female trout. I saw them in the Allan, on the redd below the wool-mill damhead.

JOHN M'LAREN, fishmonger, Auchterarder.—I have been a fisher since I was able to fish. I am acquainted with the falls of Tummel, Rannoch, &c. Have fished Loch Rannoch and the river Rannoch frequently. There are falls there of considerable height. Never knew any one who had seen salmon above the falls. I consider it impossible that any sea fish whatever could get above these falls. I have found the bull trout there, which is not a sea trout. Neither is the char trout, which is found there, and also the parr. I have caught parr often, and know them well. I have found parr in Rannoch in abundance, the same as I have found in the Teith; and I found plenty of them in all the streams thereabout. I have seen smolts often, but they are not like these. There is a difference in the head, and in the line on the belly, which in the smolt is blue. That parr you show me has come to maturity; whereas the smolt is long and small, and has not. The fin in the smolt is darker. I have traced the growth of the smolt from the formation of the eye, which appears first, down till the time it left the

locality where I was. It has never during the whole time any resemblance to the parr. (Shown the grilse and the parr on the table). These are totally different. I know the sea trout. I don't know a sea trout they call the bull trout. There is a trout goes down the Earn, and other sea rivers, which sometimes intermixes with the salmon, but the trout at Rannoch are quite a different species. This sea trout has no connection whatever with the bull trout of the Rannoch, which is just like a large yellow trout. The bull trout takes the parr for bait. Both the bull trout and salmon take their young for bait. The smolt grows very rapidly.

*Cross-examined.*—The smolt, when stripped, had no appearance of the parr. I fished in the Rannoch about two years ago. The last time before that was six or seven years since. The bull trout, the char trout, and the pike, are there. I say the bull trout is not a species of the salmon, but of the yellow trout. I have seen salmon at Callander spawning, and also at Loch Lubneg. I examined them. I saw the spawn deposited there. I saw the fish spawning about Martinmas. I looked at them in the spring; they were then in a clustering state. They were in the egg till the end of February, and came out of it about the end of March. They were of a very small species. Can't say I saw them going with the egg attached. They were small like needles then. You could see them in any back water about the middle of April or so, when they begin to get stronger, and get on the silvery gloss in the month of May. The first time the water comes down, they disappear altogether. Don't know where they went to. Some of them would be about four or five inches.

By the SHERIFF.—I have seen the young of the bull trout very small. I have seen them like needles. They are to be found in Loch Lubneg, &c. There are no trouts in Loch Drunkie, but pike in abundance. Have seen the bull trout spawning.

JOHN ROBERTSON, carpenter, Aldrui, near Kinloch, Rannoch.—I fish often in the Rannoch. There are the common trout, the char trout, &c., there. The chars are a species by themselves; they are red below and blue on the back. That is a parr you show me. There is one there has marks of both kinds, but it would never grow to a salmon. There are plenty of parrs in the Rannoch, and in all the rivers about us. I never found any but male parrs. I think there is not such a thing as the female parr in our part of the country. As far as I can judge I see no difference between that parr and our fish. The fall at Fasclly is very high. They put creels at the bottom of the fall, and catch the fish coming back. I

never saw salmon there. I think it impossible for them to get up the falls at Tummel Bridge or Fascly. Pitlochrie is twenty-one miles from Kinloch-Rannoch. I don't think they can get over the Fascly falls. Never heard of salmon or smolts being there. They are so uncommon in our country as never to be seen there at all. The parr is very easily caught. The char is different from the parr; it is not so plenty, or so easily taken. The parrs have no red spots till they begin to lose the marks of a parr. I think the parr in our district is the common trout. It has that mark while little, but when it grows up it loses it. I think the parr are all one species.

*Cross-examined*—The parr grows to the same as the common trout in Loch Rannoch. The falls of Fascly are higher than the others. I can't tell whether there are floods which would enable the fish to overleap the falls.

JAMES KING, watchman on the Allan.—I am a watcher on the Allan, and have been a fisher for more than thirty years. I have taken grilse, salmon, and smolt in the Allan. These on the table are all parrs except one, which is a minnow. The second lot are also parrs from the same river. I never opened smolts, but have opened parrs often. I know a male parr from a female. I have stripped a smolt, but there is a great difference from the parr. A smolt is darker and glossier than the parr. The parr's head is sharper and smaller. The smolt's shoulder and head is broader, but sharper at the end. The smolt has the same marks but has not the same clear colour. I think the parr is a different species from the smolt. The fins of a smolt are blue, the parr's yellow. No difference in the tail, little difference in the flesh fin; the parr's is a tingy red colour, there the smolt has no tinge. I caught the fishes Mr. Galbraith had here last court day. Some of them were different from these, one or two of them. These are a fair specimen of the Allan parr. The parrs I caught I think, in my judgment, were not young salmon.

*Cross-examined*.—When I scraped the smolt it had the same appearance as the parr, but not so clear.

By the SHERIFF.—The parrs I caught were two or three of them different from these. They were larger than these. It astonished my judgment when I saw them. They appeared different. It is my opinion these are a different species of parr.

*Cross-examined again*.—The parr's marks are much more clear than the smolt's. I have seen a fry not fully covered with the silvery coat. I have seen them half covered. The half un-

covered had the appearance of a parr, but not so bright in the colour. I have caught fish before April, and have killed a smolt with the bars, but no silver coat. When they take on the coat it goes over them like a leprosy as it were. The salmon take on the silvery scales after they spawn before going down again. The smolts going down as salmon fry are going to the sea; some return as grilse, some as sea trout. I know the fish I saw with the scales to be a smolt from the bars, and I know smolts from parr before they take on the coat. I have had no reason to change my opinion this thirty years or more.

*Re-examined.*—I have seen the smolt before it took on the scales, but it is different from the parr.

THOMAS ALLAN, residing in Stirling.—I know parr from smolt when I see them. I remember my brother and a young man bringing home three smolts and two parrs, and putting them into a spring well where they could not get out. The smolts grew rapidly and died in about six weeks. The parrs grew very little in six months. The parrs were lifted out into a bucket when cleaning the well. I kept the parrs from about April till this time of the year. I could not swear these are all parrs you show me.

*Cross-examined.*—I do not know to my own knowledge where they were caught.

JOHN HUNT, Dunblane.—I know Bruce's well. I got two parrs from the Allan, and put them in. One of them remained there five years, the other one died in a few days after it was put in. I left the place at the end of the five years, and lost the parr. I watched it all these five years, and it remained a parr all the time. (Shown some fish on the table). Four of these are parrs; I can't say to the rest of them. I caught the two parrs myself, and am perfectly satisfied they were parrs.

PETER SPEEDIE, Dunblane.—I have fished for thirty years, and mostly in the Allan, and have caught parr, yellow trout, and salmon. I know Bruce's well. I saw a parr fifteen or sixteen years ago in it, for two or three years at any rate. I can swear it was a parr. I saw John Hunt bring home two and put them in. The other one died soon after it was put in.

*Cross-examined.*—The fish swam through the well. The water in the well is hard. The parr never attempted to get out. The well was cleaned, and I had the parr in my hand. It was put in again. Don't know who took it away. It was weakly, I think, after being caught while the well was cleaning. I know

smolts when I see them. The parr in the well had no appearance of a smolt.

JAMES ANDERSON, Dunblane.—I was in court and heard the evidence the first day, but not the second. I have fished for forty years during fishing time, every season. I have fished Kilbryde burn from top to bottom. There are six or seven rocks in the burn. I have caught parr in the burn below the Castle. I have seen grilse above the rocks, and have also seen sea trouts. Below the rocks I found parr, but none above. Have examined parr, and found roe and milt in them. The smolt has not the least appearance of the parr.

WILLIAM JACK, Dunblane.—I am a fisher, and have fished a good deal in the Allan, Kilbryde, Murdochford, and the Teith. I have caught parr in all these except Kilbryde. I have seen sea trout caught there. Never saw parr caught there, although I have fished with the same bait as caught them in other places. I have seen parr opened, and have seen milt and roe in them. I have seen them on the redd in the attitude of spawning. Never found the parr becoming thinner or smaller. I have seen them in a full state. Have seen smolts, and seen the coat coming off in my hands, but it is not then like a parr. The dead fin of the smolt is clear and blue. The parr's head is shorter. The smolt's is more tender. We lose ten smolts for one parr, while fishing, on this account. There are no smolts among the fish you now show me.

*Cross-examined.*—The fish you now show me are, in my opinion, all parrs except one, which I am not sure about. I did not see the parrs in the pitcher in the other room.

PETER KING, Dunblane.—I have fished for thirty years, and have caught yellow trout, smolt, parr, salmon and grilse. Have never found milt or roe in the smolts, but both in the parr. I have caught parr this season, and examined them. I saw two or three opened in August, and saw the roe; it would be nearly an inch long. The parr is firmer in the flesh than the smolt. The smolt is more tender in the mouth than the parr. I have fished Kilbryde burn, and got parrs below the Castle, but none above it. I have got sea trout above the rocks. I saw a Tay parr last court day. Looked at it through the bottle it was in, which also contained a smolt. They appeared to be different. The parr from the Tay had a bigger head, I thought, than the Allan parr.

*Cross-examined.*—I don't recollect finding parr above the Castle. The fish you show me are all parr. I think I have caught yellow fin in Kilbryde burn. The parr is most abundant in the Allan as

soon as the smolts get out of the water. The smolts are out of the Allan, if the season answer, some time in June. There are parrs in the Allan in March or April.

The operations at the Stormontfield pond, to which reference is frequently made in the lawsuit against Shaw, appear to have completely captivated the understandings of some men. Notions about the nature of parr, which they had held from their youth upwards, vanished at once when that formidable establishment commenced breeding fish. It is, therefore, very desirable to know something of the erection and management of this generative nursery of the salmon species. Peter Marshall, who, at the date of the lawsuit with Shaw, was examined by Mr. Galbraith, the pursuer (as will be seen from the foregoing proof), swore that the ova was put into the pond, on gravel, in November, 1853; and in cross-examination he deponed—that the gravel in the pond was taken from the river, within 300 yards of the pond, at which place the water was fresh; that the pond is about a quarter of an acre in size, *and open to the public*; that the pond was not watched night and day; that the second year the pond was emptied altogether, and the whole fish were then out of it, the bottom cleaned out, and new stones put in, and at that period it was dry for a fortnight.

Under such circumstances, it is very remarkable to find the witness swearing that “it is quite impossible, I think, that young parr could have been thrown into the pond.” Most people will be disposed to think it was the easiest thing in the world to perform such a feat. Probably his doubts arose from his ignorance of the existence of parr. “Before 1853,” says he, “I had no experience of parr.” To make up for this want of knowledge one court day, he goes back

another court day, and endeavours to shed a flood of light on the controverted points; but the dispassionate reader will hardly conclude that he has been successful in dispelling the darkness. It is not a very logical way of doing it to tell that "we have many visitors at the pond. I often show the sluice works. There may be half-a-dozen inches of water free at the bottom. I lift the sluice, during both spawning and breeding time, to all the visitors who ask." No doubt some pertinacious and brave true parr and voracious trout often visit the boundaries of the pond, snuffing up "boiled liver, rubbed small," and other good feeding to be found therein (for Mr. Stoddart expressly writes that the trout family "have a keen distinguishing sense of smell"), and on such occasions as the opening of the sluices, would adopt the noble sentiment, "never venture, never win," and make a heroical dash through when the visitors were drawing off the attention of the keeper. Even although Mr. Walsh, the gunmaker of Perth—who has, by his own account, taken a great interest for fifteen or sixteen years in what was going on at the Stormontfield pond—had been there, armed with his best breech-loading rifle, and patent cartridges, he could not have popped! popped! so fast as to impede their progress, and prevent the little trouts and parrs having ingress to salute their royal cousins, and have a comfortable repast together, in the celebrated Stormontfield pond. It is a pity that gentleman did not give the ages of the fish, and their species, when he says, "I have seen a fish one ounce in weight, and one sixteen pounds, *both the same age*." This looks rather like a phenomenon in natural history. How did he happen to know when each fish was born, and the particular locality? There are marvellous inventions in gunnery



now-a-days, but the two fish, of the same age and so different weights, beats those inventions hollow. The law prosecutions, which were instituted by Mr. Robert Buist, before quoted, do not exhibit that gentleman's private sentiments *previous* to 1832, and, therefore, it is proper to show that Mr. Hogg, the Ettrick Shepherd, converted him, in conjunction with the Stormontfield pond. Mr. Buist has put in print the following history of his conversion.

So far back as 1832, I wrote, in a paper in the *Quarterly Journal of Agriculture*, an answer to one by James Hogg, the Ettrick Shepherd, in which he propounded the novel and startling doctrine that the parr was the young of the salmon, and that, consequently, it was most prejudicial to the rivers to allow so many young salmon, under the name of parr, to be destroyed. Unable to adopt such a view of the question, I took up the popular dogma—that the parr was a distinct fish by itself; and, in proof of this assumption, argued that the parr was a little hardy complete fish, having no affinity to the salmon, whereas, on the other hand, the young salmon, or smolt, was a tender delicate fish, bred in the month of March, and going down to the sea in May following. In further proof, I stated the curious fact, that in the month of November that year a milt parr was brought to me with the milt flowing from it. The sentiments which I then entertained were just in accordance with the general opinion of the day; but the discovery noticed above has shown that the Shepherd was right, and that I, and nearly all the world beside, were wrong. That very instance which I adduced of the parr with the milt flowing from it has, by the recent experiments, proved the identity of the parr with the salmon. The parr in question was really the young salmon of the second year, which had not then gone to the sea. At Stormontfield we have repeatedly seen a young salmon, which remained in the rearing pond till the time of migration in the second year, though only the size of a man's finger, get into such a state of milt in the breeding season, that we have impregnated eggs of the full-grown salmon with it, and thereby produced young fish. Such is not the case with the sister fish of the second year in the pond, as not even the rudiments of roe can be traced in them. This fact shows incontestibly the great benefit that may be gained by the strict preservation of the parr, as, previous to this discovery, it was taken

by thousands in small meshed nets in some salmon rivers in England, from which both salmon and parr have now entirely disappeared. *The Stormontfield Piscicultural Experiments.* By Robert Buist. 1885.

Mr. Buist's article is very curious in more respects than one, and must be read from beginning to end to be appreciated. It is plain that poaching is a trifling means of destruction of salmon, compared with other agencies. Trouts lay waste the salmon spawn; the pike and the eel do so; the water crows do so also; and the heavy floods that come on after sudden thaws "sweep millions of eggs from the places where they were deposited." Mr. Buist's description, in his warily written paper in the *Quarterly Journal of Agriculture*, in 1832, of the parr, is very good. "The parr," he says, "is a compact fish, with firm scales, small head and eye, and from every appearance a fish come to maturity. The smolt is evidently a young tender fish; its scales come off with the slightest touch; its head and eyes are large, like other young creatures that are destined to be of much greater size. Both have forked tails, red spots, and what Mr. Hogg calls blue finger marks. But the greatest and most decided difference is this, that parrs are found in our rivers *at all seasons of the year*, and *smolts*, or what we reckon salmon fry, *only from March to about the middle of June*. The difference between the fish, even in this respect, is almost sufficient to prove that they are not the same species." Mr. Hogg and Mr. Buist are, in opinion, as wide as the poles asunder. They both join heartily, apparently, against what they style "Cockney anglers." But the strife has a wider range, for Mr. Hogg puts a question into the mouth of a correspondent of the *Agricultural Journal* to this effect:—"What can be

the salmon's motive for ascending the rivers at that period?" and he answers his own question thus:—"I answer, that I always understood it to be in order to get quit of the sea-louse, whereas your correspondent jocularly affirms 'that these lice exist only in the heads of the stake-net owners;' a base insinuation! though, I believe, it is acknowledged that a fish diet has the effect of engendering these vermin on the human species." Was the schoolmaster abroad in 1881?

The late Professor Wilson made the Ettrick Shepherd discourse very eloquently of whisky punch, and some other congenial topics, in his *Noctes Ambrosianæ*; but so far as memory goes, he did not put speeches into the mouth of the Shepherd, representing that gentleman as a master of natural history, and particularly of that division of it known technically as vertebrate animal. On searching the pages of Lowndes, no notice appears of any work on fishes by Mr. Hogg, although a numerous and complete list of his other works is inserted. When a judge uses a few transient words on a collateral subject, it is styled an *obiter dictum*; so probably the Shepherd had his *obiter dictum* with respect to parr. It must, however, be here distinctly understood, that when notice is taken of Mr. Hogg's sentiments on the parr and salmon question, there is not the slightest desire to disparage his general abilities or kindly disposition, or the rough hospitality for which he was famous, but simply to endeavour to show that he is not an eminent authority on piscatory matters.

Before any man, or set of men, can, with any show of reason, pretend to pronounce a deliberate opinion on the nature and species of parr, in opposition to a sort of universal traditionary sentiment handed down from father to

son—as well as a wide spread and uniform course of action indicative of a like feeling—that parr are not the young of salmon, but a distinct species of fish, he or they must use due diligence, and labour in an analytical form. Such, for instance, as is described in the following extract—the operator being Mr. William Yarrell, F.L.S., a gentleman of very great theoretical, as well as practical, knowledge in the piscatory art—

Whitebait was considered formerly to be the young of the chad, but in an article in the number of the *Zoological Journal* (No. 16), this doctrine is combated by Mr. William Yarrell, F.L.S., who was led to investigate the subject by observing the early appearance (March) of whitebait in a fishmonger's shop; and knowing that chads, which they were supposed to be, do not make their appearance until much later (May), he took up and persevered in a course of investigation from March to August, 1828. The specific distinction between the two fish, on which he relied as of the greatest value, is the difference of their anatomical character, and especially on their number of vertebræ, or small bones, extending from the back bone. The number of vertebræ in the chad, he states, of whatever size the specimen may be, is invariably fifty-five, the number in the whitebait is uniformly fifty-six; and even in fish of two inches, by the assistance of a lens, this exact number may be distinctly made out.

That the course of action hitherto pursued in Scotland is totally against the theory of true parr being the young of salmon, is evidenced by Mr. Stoddart, an author on angling, and a thoroughly practical man, who speaks of “trolling with parr for large trout” in the “Highland lochs,”—a mode of dealing with that fish quite subversive of the idea of it being the young of salmon. The title of Mr. Stoddart's book is *Angling Companion on the Rivers and Lochs of Scotland*. 2nd edition. William Blackwood & Sons, Edinburgh and London. 1858. This gentleman certainly appeared at the

time he wrote this book, to have sympathised with his poorer brethren in the piscatory art, as the following quotation proves (p. 2)—

Our very mill-runs still contain trout, our lakes and rivers abound in the scaly tribe. Ramble with me from shire to shire, and I warrant thou wilt cull from each a measure of sport ample enough to satisfy a man of moderate wishes. Art thou otherwise, I have no key to thy humour; in these days, alas, of exclusion and selfishness I have no power to assist thee; but there is trout enough for all, for the sport of the peasant as well as the peer; and a malison seize the churl who would grudge to the labouring man his snatch of pleasure, or deny him, although obtained through his own skill and industry, the morsel that economises, or adds life-prolonging zest, to his homely and every day fare.

Even Mr. Hogg devoured these little fish voraciously. He writes—"I snapt them up to my breakfast at the rate of from ten to twenty at a meal." This was "as soon as he began to be an angler, which was rather late in life." Again he says—"I found over all Scotland, that where there were no salmon there were no parrs, and *vice versa*." This is contradicted by the citations from *Cassell's Natural History*, and from the personal experience of thousands of Scotsmen who have taken parr where salmon never swam, or could swim. So there was a mistake in the Shepherd's "sublime theory." It was a very indifferent way of solving any difficulty about parr, to "publish among poachers, and on smithy doors, that all the fish that were back-halved in the tail were mine: that I would not claim the fish as my property, but whoever would bring me word of such a fish having been taken, and seen by witnesses, I would give him a dram." The Shepherd's description of the sea trout is amusing,—“They are handsome, coarse-tasted fish, but very fat; with a short, broad tail—not swallow-tailed, like the

salmon—dark grey on the back, and bright below. I see huge ones frequently sold in Edinburgh market for salmon." The bull, or sea trout, is not only very fat, but it is likewise very voracious and destructive, as may be learned from the 18th Annual Report, 1878, of Messrs. Buckland and Walpole, pp. 18 and 85, published in 1879, as a Parliamentary Blue-Book. The Shepherd's notions of constitutional law are evidently as hazy and weak as his theory of parr. To prevent parr being caught, "let plenty of men," says he, "be duly authorised, through all the towns and villages in the country, and wear a staff or badge of authority, giving them a right to search every angler's basket; and for every parr or smolt found there, let the angler be fined a sixpence, *which shall belong to the officer, and be his sole remuneration.* There are plenty who will take it in hand, and be glad of the deputation—a twenty dozener would be a fine prey for him." The editor of the *Journal of Agriculture*, naturally enough, does not put his *imprimatur* to Mr. Hogg's lucubrations. Neither does he give an approving sign to the following system described also in the *Quarterly Journal of Agriculture* for March, 1882 (p. 629).

Our Perth town officers shouldered their Halberts, and by tuck of drum, proclaimed by order of the Magistrates that there should be no killing of smolts. This was considered as a declaration of war by the salmon fishers against the school boys, and *Cockney Anglers*. The fishers scoured the water-side, captured every fishing-rod and emptied pockets and baskets of their contents. This might be considered a stretch of power, but I never knew it called in question, and for the most part the culprits were glad to get so easily off. The boys, like Mr. Hogg, would sometimes plead in extenuation that it was parrs they had taken, and insisted on an inspection of the seizure; when this was done, one parr in twenty might be found, and the culprit for the trouble he gave, had generally to undergo the additional penalty of a cuff in the neck.

See also on this subject, the *North British Mail*, of date Saturday, 26th August, 1871. It cannot fail to strike the attentive reader of the foregoing Perth narrative, that the writer thereof distinctly admits there existed a distinct species of fish called "Parr," from the smolts or fry of the salmon.

We have now arrived at that stage of the work where it is suitable to take notice more at large (than is done at a previous page hereof, viz., 20) of the next salmon statute immediately following that of the 7 & 8 Vict., cap. 95, which has hitherto been distinctively named the *Whitling Act*. The new Salmon Act, 25 & 26 Vict., cap. 97, is not without its own peculiarities; and it is worthy of special notice, that the Salmon Statute, 7 & 8 Vict., cap. 95, is not so much as once alluded to in it, or in any of the subsequent Scotch salmon statutes which have passed through Parliament since the 9th August, 1844, up to and including the one dated the 31st July, 1868. It (25 & 26 Vict., cap. 97,) was passed on the 7th August, 1862, and was promoted and carried through Parliament also by the Tay Fishery Board, in consequence of Mr. Sheriff Grahame's decision, dated 20th January, 1858, already recorded, and to get rid of the effects of that judgment. This example of getting Parliament to render nugatory the law, as laid down in the Law Courts, is not a solitary instance. Another one may be seen in the law suit of Galbraith, Cullen and Galbraith junior, and the Edinburgh and Glasgow Bank and John Whitehead, S.S.C., and Charles Morton, W.S.—*Scottish Jurist*, vol. 31, p. 425. To get rid of that judgment certain persons went to Parliament, and got the statute 19 & 20 Vict., cap. 89, passed, abolishing the paging of deeds of conveyancing, to the great detriment of the law, and the public welfare, and it passed without

opposition, because the people of Scotland at large were ignorant of the movement. They wished, like Pythagoras, to acquire and exercise universal dominion, and, also like him, they joined legislation to their philosophy. The preamble of 25 & 26 Vict., cap. 97, is this:—"Whereas it is expedient that the Acts relating to the Salmon Fisheries in Scotland should be amended, and further provision should be made for the regulation of fisheries, the removal of obstructions, and the prevention of illegal fishing; be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows." Section 1 describes the title of the Act—"The Salmon Fisheries (Scotland) Act, 1862," so that it neither applies to England or Ireland. Then section 2 interprets the language used in the statute, whereby the public learn that "'salmon' shall mean and include salmon, grilse, sea trout, bull trout, smolts, parr, and other migratory fish of the salmon kind." It will be observed that "whitling" is quietly dropped out, and the word "parr" substituted in its stead, along with the catching phraseology, "and other migratory fish of the salmon kind." Do these words make the description more complete? "Migratory" just means change of place: and don't all fish change from place to place, as it suits their taste? There is one fish, named *Anabas testudineus*, or "tree-climbing fish," which, for the sake of variety, leaves the water and climbs trees; and jugglers carry them about to amuse the people. (*Cassell's Natural History*.) Again, eels are found oftentimes in ponds, far away from running streams, and have never been placed there by the hand of man;—in short, that fish have the power of travelling



on land for considerable distances, and when some of the species find their quarters in the running streams uncomfortable, they take in a good supply of water, and journey landward to some piece of water they like better. Dr. Plott, in his *History of Staffordshire*, says that they pass in the night across meadows, from one pond to another; and Mr. Arderon (in the *Transactions of the Royal Society*) give a distinct account of small eels climbing up the flood gates and posts of the water works of the city of Norwich. They have also been seen in Scotland crossing fields, and have been taken for serpents. They are migratory,—so are all fish. The only solution of the difficulties appertaining to salmon, is to describe fairly, and in a common-sense manner, what is meant by “fish of the salmon kind.” To proceed piecemeal, adding and subtracting every now and then some member of the trout species, is a very dangerous kind of legislation. An author, speaking of trout, uses these words:—“Under this name (trout) may be ranged various members of the salmon family, clearly distinguishable from the noble fish that stands at their head.” Then he says, the salmon trout is next in value to the salmon itself. The common trout, again, varies so considerably in appearance in different localities as to lead to the supposition that several species exist; and it is only necessary to peruse Mr. Stoddart’s description of trout, in the second edition of his *Angler’s Companion*, published in 1853, to be thoroughly convinced of that fact. His observations at pp. 250, 251, 252 of his book are deserving of the attention of members of Parliament. *He justly complains of the abuses of legislation, and of inferior species of fish being “bundled up together with the true salmon.”* But are the statutes of the realm to be made prolix and undefinable to meet the diversities of species created by

the Divine Being? What is known as the grey trout—often called the bull trout, or roundtail—is distinguished from what is known as the common trout by several specific peculiarities; and no doubt it is distinguished from the salmon by like special peculiarities. Mr. Walpole adduces clear enough evidence of this in the Joint 18th Annual Report by Mr. Buckland and himself, p. 109, where Dr. Günther, of the British Museum, was at his wits end to tell what sort of fish it was, which was placed before his eyes. In short, to use Mr. P. S. Slater's words, in an article of his, in the *Nineteenth Century Magazine*, vol. 4, p. 1087, there are "some difficulties in zoological distribution," although the framers of Acts of Parliament don't seem to think so. A very eminent divine, Thomas Sherlock, D.D., Master of the Temple Church, London, remarked, relative to speculative matters, "When men come to speculation, they differ as much in the cast and turn of their minds, as they do in their features, and lineaments of their faces; and therefore speculative reasoning will never produce a common persuasion." Sir Robert Christison, M.D., of Edinburgh, in February, 1873, related at a meeting of the Royal Society, that he himself was quite bewildered when he studied Dr. Günther's Catalogue of Fishes, but that on turning to the preface thereof, the darkness was dispelled by these words, "The salmonidæ had no representative among the known fossil formations," and the learned baronet thence concluded that they were of a comparative new creation, and that they had existed for so short a time, that their species had not yet become sufficiently differentiated. If anything more was needed to increase the puzzle about the salmon species and their ailments, it will be found in the evidence and report thereon of Messrs. Buckland,

Walpole and Young, issued in October, 1880, on the nature and cause of the disease which has recently occurred among salmon, in certain rivers. Then we have the expression in the preamble, "illegal fishing," which seems to require interpretation much more than "Commissioners," "Clerk," "Justice or justices," "Secretary of State," "Proprietor or Proprietors," "Bye-law and Bye-laws," "Fisheries and Fishery," "River," "Valuation Roll." Penalties follow breach of law, and therefore the law should be clearly defined. Section 11 enumerates various acts as being offensive; but that section is inseparably connected with a previous one, which is infinitely obscure in its phraseology,—viz., section 2, where the term "parr and other migratory fish of the salmon kind" is used. What interpretation is to be put on the pronoun "other," in connection with the words "salmon kind?" As if these difficulties were not enough, the framers of the Act go on to provide that the District Board may, "with the consent of all the proprietors of salmon fisheries in any river or estuary, adopt such means as they think fit for preventing the ingress of salmon into narrow streams or tributaries, in which they or the spawning beds are, from the nature of the channel, liable to be destroyed; but always so that no water rights used or enjoyed for the purposes of manufacture, or agricultural purposes, or drainage, shall be interfered with thereby." Such sort of legislation reminds one of the facetious controversialist who promised to drink up the sea, provided his opponent would first stop all the rivers from running into it. If legislators would study geology before dealing with rivers, they would be a little more cautious. Thomas W. Jenkyn, D.D., F.R.G.S., speaking of atmospheric

waters in causing land-slips, writes—" They prove that water may be regarded as one of the most powerful and subtle agents which nature wields, and that its activity produces some of the greatest changes, and some of the most remarkable phenomena, in physical history." (*Cassell's Popular Educator*, vol. 3, pp. 156, 167, edition 1853.) Farmers who happen to have fields and crops bordering on these dammed-up narrow streams or tributaries, would soon find out that. The statute gives *them*, however, *no voice* in the matter. It is only proprietors of salmon fisheries who can be approvers or dissenters.

It is clear the trout and salmon have fallen on hard times, because machinery which will stop a salmon going into a narrow stream or tributary, will debar the trouts from getting out. The perforated zinc merchants and mechanics will be in complete ecstasies at the profits which they will realize by putting such obstructions into the mouths of narrow streams and tributaries, after the fashion of the famous Stormontfield pond. There will be a perennial supply of labour and work, for when the storms set in, and the floods descend, the barriers will be constantly swept away, fully realizing the old Scotch saying, "It's an ill wind that blaws naebody gude." The fishes alone will swim in sackcloth and ashes when such a horde of barbarians invade their watery domains. The Commissioners appointed by the Secretary of State must rejoice heartily too, for they will require to superintend the erections, which will engage them, at least, the better part of years—and they have £3 per day to console themselves with. The assessment levied under the statutes will be sure to lessen rapidly under the novel expenditure of "Expenses incurred in obstructing the ingress of salmon into the narrow

streams and tributaries." The collapse of the money-bags in the methodical dream of Addison (*Spectator*, No. 8) will appear harmless beside it. Mr. Buist rejoices that the *assessment is general*, as he well may. "Fortunately, the new Act authorises a general assessment, which, however, is but a mere trifle when levied on a rental of £17,000." He forgets the Morayshire floods in 1826. He forgets that, even in this country,

Loud roars the dreadful thunder,—  
The rain a deluge showers :  
The clouds are rent asunder  
By lightning's vivid powers.

The last salmon Act which was passed for Scotland is the statute 31 & 32 Vict., cap. 123. It is dated the 31st July, 1868, the preamble being, "Whereas an Act was passed in the 25th and 26th years of Her present Majesty, cap. 97, intituled, 'An Act to regulate and amend the Law respecting the Salmon Fisheries of Scotland;' and another Act was passed in the 26th and 27th years of Her present Majesty, cap. 50, intituled, 'An Act to continue the powers of the Commissioners under the Salmon Fisheries (Scotland) Act until the 1st day of January, 1865, and to amend the said Act;' and another Act was passed in the 27th and 28th years of Her present Majesty, cap. 118, intituled 'An Act to amend the Acts relating to Salmon Fisheries in Scotland;' and to legalize certain orders or bye-laws, of the Commissioners, besides giving power to the Home Secretary, to confirm any bye-laws made under the provisions of the said recited Act altho made too late in point of time," and then section 1st bears, "This Act may be cited for all purposes as 'The Salmon Fisheries (Scotland) Act, 1868.'" Such vigour and rapid resolutions to amend all crudities was never before

seen. It is nothing but amend! amend! amend! And Mr. George Young himself blames the obscurity of the said statutes, as may be seen from his "Notes," published by Edmonstone and Douglas, Edinburgh. It is pleasant to see how successful at last the framers of the different statutes have been in defining emergent obscurities. One short line and four words have done the business, as is betokened by section fifth. "This Act shall be read, and construed along with the recited Acts, as if the same formed one Act." The poor salmon and trout will turn up the white of their eyes at receiving such relief as that of hindering their ingress or egress from such streams as their natural instincts impel them to visit. Why should not salmon and trout have power to *reach* what they desire, and to *shun* what they fear? The frequent pollution of both large and small streams, now-a-days, by manufacturing establishments placed on their banks, make these polluted streams unsuitable for and fatal to fish. The same sort of thing went on in Scotland, so far back as the year 1606, by the people laying lint into lochs and running streams, thereby polluting the same, until King James VI. of Scotland, afterwards James I. of England, put a stop to such practises by Act of Parliament on the ground that the lochs and streams were rendered useless for man and hurtful to all fishes and bestial, and fixed a penalty of 40 *toties quoties* for every contravention of the Act, as well as confiscation of the lint. (See appendix for a copy of the proclamation.) The herculean task of obstructing the mouths of narrow streams and tributaries remains in all its glory, as well as other manifestly defective provisions. Thus, while the framers of the statutes profess to cure imperfections with one hand, they really adopt and perpetuate them with the other hand. One would

think they often conclude sophistically in that fallacy which is called *a dicto secundum quid ad dictum simpliciter*. The king and queen of fish will never be able again to visit in state their humble kindred in the narrow streams and tributaries, which, no doubt, will be a cruel deprivation to them, because, when his and her fishy majesty are hungry, they are not very punctilious, but just gobble up a parr or trout, whichever first comes across their path,—even their own brood are not exempt from such a fate, and in this respect they are cousin german to the now extinct lizard known as the ichthyosaurus, which also devoured their own young. Sometimes the wind itself deals hardly with fish. The hurricane of Jamaica, in 1815, brought with it such an enormous quantity of rain, and blew so furiously on the swollen rivers, that the flood of the river Yallahs actually swept away all the fish that were in it, and that so thoroughly, that ten years after no fresh water fish could be found in the stream. They perished in the sea. (*Cassell's Popular Educator*, vol. 3, p. 216, edition 1853. See also Isaiah xix. 5—10, Louth's Translation.) Most fortunately for the English and Irish anglers, all these extraordinary amended Acts do not extend southward, or across the Irish Channel. Section 41 provides against such an event, by these words,—“This Act shall not extend to England or Ireland.” There is no specification of the kind of fish which it is unlawful to take, in this Act. That information is only embodied in the statute dated 7th August, 1862, 25 & 26 Vict., cap. 97, already referred to at some length.

We now proceed to notice the litigated case of the Tay Fishery Board *v.* Miller, in 1869. It was first decided by Sheriff Barclay against the Tay Fishery Board; then it was appealed to the Justiciary Court, and the presiding judge—

Lord Jerviswoode—remitted back to the Sheriff to enquire into the several matters raised under the complaint, that is, whether parr was salmon fry, which being done, a new decision was pronounced by the Sheriff against the Tay Fishery Board. Then followed another appeal by that Board to the Justiciary Court. The presiding judges—the Lord Justice-Clerk (Moncrieff) and Lord Cowan—this time decided in favour of the Board. The circumstantialities of the whole litigation must, however, be given in detail, along with the proof led, to enable the reader to form a correct idea of the dispute.

#### BLAIR *v.* MILLER.

Mr. William Blair, writer in Perth, presented, on the 30th August, 1869, a complaint (under the Summary Procedure Act, 1864), setting forth that he was authorised to prosecute, on behalf of the Tay District Board, Robert Miller, pointsman, residing at 81, Pomarium Street, Perth, for contravening the Salmon Fisheries (Scotland) Act, 1868, and sec. 19th thereof, “In so far as, upon Saturday the 26th June, 1869, or about that time, the said Robert Miller had in his possession nine smolts or salmon fry, and that at or on the banks of the stream called the Machony, a tributary of the Earn, a tributary of the Tay, and at a part of the said stream at or near the farm of Kirkton, in the parish of Trinity Gask, and county of Perth, and the said nine smolts or salmon fry were seized in virtue of said Act;” and then the complaint prays that Miller should be convicted of a contravention of the Act, and found liable to pay and deliver to the said William Blair a sum not exceeding £5 for the said offence, and to forfeit the said smolts or salmon fry.



On the 6th September, 1869, a diet was fixed, and the complainer and respondent, accompanied by agents, attended, when a preliminary plea was stated that it was necessary, under the section founded on, to allege and prove wilful possession of the fish. The Sheriff, however, repelled that plea as preliminary, and reserved it on the merits, and the respondent then pled not guilty. Another diet was then fixed, viz., 15th September, for the complainer examining his witnesses. At that diet he examined three witnesses, viz., (1.) John Campbell, river watcher, Strathblain; (2.) Alexander Croll, superintendent of salmon fisheries; (3.) Peter Marshall, Stormontfield Ponds. And at the same diet, the defender examined one witness, viz., William Dick, railway pointsman, Perth. Parties' procurators were heard on the merits thereafter, and avizandum made with the process. The Sheriff then pronounced the following interlocutor or judgment:—

PERTH, 8th October, 1869.—Having heard parties' procurators, and made avizandum with the complaint and the proof,—Finds it proved that, on the day libelled, the defender had in his possession certain fish commonly known as parrs, but which are not named in the prohibitory and penal clause libelled; but finds it not proved that he then had any fish known as smolts, the only fish named in the same section of the statute libelled, and declines to inquire, and decide the question in natural science, whether parr be, or be not, salmon fry: Therefore dismisses the complaint, and decerns against the complainer, in favour of the defender, for one pound of costs, with the expense of extract.

To which the Sheriff appended an explanatory note embodying his own views.

*Note.*—This is a complaint at the instance of Mr. Blair, acting for the Tay District Board, against Robert Miller, laid under the 19th section of the Salmon Fisheries Act, 1868, setting forth that, "in so far as, upon Saturday, the 26th day of June, 1869, or about that time, the said Robert Miller had in his possession nine smolts

or salmon fry, and that at or on the banks of the stream called the Machony, a tributary of the Earn, and at a part of said stream at or near to the farm of Kirkton, in the parish of Trinity Gask, and county of Perth, and the said nine smolts or salmon fry were seized in virtue of said Act."

The proof is that the accused was found on the banks of Machony on the day libelled. A river watcher asked him what take he had. The accused readily answered that he had taken some eels and a few small parrs. On being asked to show the contents of his basket, he unhesitatingly did so. In addition to the eels, there were found nine small fish, all of which were captured by the watchers. These were exhibited in court in two bottles. An additional third bottle was shown, merely by way of contrast, containing a larger fish, which was sworn to be a yellow trout, and was admitted not to belong to the salmon family. Five of the smaller fish were sworn to as being parrs, and four in the second bottle as belonging to a migratory class, which might be the spawn of sea trout or of the bull trout, but which were also sworn to be of the salmon tribe. These facts were sworn to by one river watcher and the river superintendent, but more especially by the keeper of the breeding seminary at Stormontfield, so well and widely known as "Peter of the Pools." He entertained no doubt as to the five in one of the bottles being indetical with those which for many years had been under his fostering care and nurture as parrs; but as to the four in another bottle, not coming under his guardianship, he could only state that they were of a migratory kind, and fell under another class, which he considered not to be parrs, but, nevertheless, to be of the salmon kind. The complainer offered further scientific evidence to establish that all the nine fish were salmon fry; but, from the opinion entertained by the Sheriff, this further evidence was not allowed. To admit such evidence appeared to the Sheriff open to the grave objection that it was to constitute an offence *ex post facto*, and that the very necessity of having such evidence, established that there was no obvious offence under the letter of the statute.

The solicitor for the defence, on this evidence, took two pleas against conviction—

1st. That it had not been proved that the accused had in his possession the parrs or other fish wilfully, thereby meaning that it must be proved that he was in the knowledge that the fish he had in his basket were smolts or salmon fry. The evidence showed that, whilst he in his ignorance thought all the nine fish to be parrs,

only five fell under that name; and there was no proof that he knew that any of the nine fish were salmon fry. And,

2nd. That the fish in his possession were not proved to be smolts or salmon fry, which are the only words in the clause libelled.

The Sheriff is certainly not much enamoured with the phraseology of the 19th section of the Act 1868, which is the one libelled on. The first question is whether the word "wilfully," at the commencement of the section, overrides and qualifies the particular offence libelled—that being not the taking, but the having in possession, smolts or salmon fry. It is clear that the term wilful was not meant to override the whole clause, seeing that it is shortly afterwards twice repeated; indeed, in one part of the clause there appears the gross absurdity that it is made an offence to place any devices or engine for the purpose of obstructing the passage of the young of salmon: and it is equally made an offence, according to strict grammatical reading, "wilfully to injure that device or engine." On the whole, however, it does appear that the qualifying word, "wilfully," does reach the act of possession. (See—25th May, 1868, Johnston—Cooper's Justiciary Reports, 41.) It is next too absurd to suppose that a person merely having possession of the forbidden fish should be dealt with more harshly than one who actually captures the animals; so that it would be necessary to prove that a person wilfully caught the forbidden fish, but not when a party may innocently and in ignorance be in possession of the sacred fish—it may even be in the act of cooking or of mastication. A man fishing can scarcely be supposed to do so in ignorance, and against his will; and if on a salmon river, he must be held culpable if he, even in ignorance, takes any fish of the salmon kind. But a person may have possession of fish, not only in ignorance of the class to which they belong, but even that he had in his possession fish of any kind.

The Sheriff is of opinion that it is perhaps not necessary to libel wilful possession as pled *in limine*, yet that before conviction either for taking or possessing fish of the forbidden species, it must appear that the accused party offended culpably, and not in ignorance—that is, that he knew, or under the circumstances should have known, the kind of fish he captured or had in his possession.

There is more difficulty in the second question. The 19th section expressly defines the offence to apply only to smolt or salmon fry. The marginal index (which note very properly is held no part of an Act, and is often found even contradictory to the text) in this instance makes use of the terms "the young of salmon."

The words of the text are not cumulative, but descriptive. The law does not say smolt *and* salmon fry, but smolt *or* salmon fry,—that is, smolt *being* salmon fry, or, as the margin has it, “the young of salmon.”

The proof showed that the accused party here held possession of a certain number of parrs, and vaguely knew them by that given name; but it must be further shown that these are not merely “the young of salmon,” as in the margin, but are either “smolt or salmon fry,” as set forth in the text and in the complaint. Now, the Act 1862 (which appears still in force) declares salmon not only to include salmon (certainly a most Irish conclusion), but, in addition, “grilse, sea trout, bull trout, parrs, and other migratory fish of the salmon kind.” This, certainly, is very comprehensive, and, with the exception of eels and flat fish, appears nearly to include all river fish whatever. The complaint is not for having in possession salmon (and unless when in a foul state such is not an offence), but it is having in possession smolts or salmon fry, and the offence applies to the whole year, open time as well as close time, and therefore is most stringent and severe. Again, it will be noticed that the interpretation clause distinguishes smolts from parrs, consequently it does not at once follow that the accused has contravened the words of the statute, since, whilst smolts are expressly mentioned, parrs are not. The framer of the statute knew and had provided for the distinction. Therefore, when he only thought to cast his net of protection over smolts as salmon fry, he must be held to have permitted the lucky parr to escape through the meshes of his legal net. This, then, admittedly drives the complainer, if it be competent, to prove, as he offered to prove, that parrs, which confessedly are not smolts, are the “fry of salmon.”

By the first Act of the multitudinous series (1828), section 4, which perhaps stands still unrepealed, the offence of possession is made applicable to “spawn, smolts, or fry of salmon;” and let it be observed that “wilfully” is there expressly repeated before the enactment as to possession. Reading the whole section of the Act 1868, in connection with the 4th section of the Act 1828, the Sheriff-Substitute is of opinion that what is meant to be included are not parrs, but smolts and salmon spawn, and spawning beds; and that the 19th section does not apply to parrs that have reached a higher state of progress than mere fry. Dr. Johnston defines “fry—the swarm of little fishes just produced from the spawn.” “Spawn,” the Doctor defines as “the eggs of fish.” The *Imperial Dictionary* (a work of great scientific authority) defines fry, “a swarm or

crowd of little fishes, so called from their crowding, tumbling, and agitation."

Penal statutes are always, and most justly, strictly interpreted for liberty, and against prohibition and coercion of freedom. The salmon statutes are obtained for the protection of property in salmon against the encroachments of the public. These statutes are framed and promoted by the proprietors, and they ought to be so distinctly expressed that the public may clearly know the limits of their rights; and the restraints thereon in favour of the proprietors of fisheries ought to be so clear, that he who "runs may read." Parties ought not to be punished through mere ignorance of a law so vague as to require scientific knowledge and interpretation.

A sketch of the Act with reference to the nomenclature of salmon will illustrate the meaning of the Sheriff-Substitute. The first of the series 1828, included "salmon grilse, and other fish of salmon kind." In 1844, a party was brought before the Sheriff-Substitute (who is now judging of the present case) charged, under the Act 1828, of being in trespass with intent to kill fish, as particularly enumerated in the Act. It was proved that the accused party had taken whitlings, not named in the statute. It was thereon maintained for the complainer that whitlings were of the salmon kind. Contradictory evidence on this question was given; and though the evidence certainly preponderated for the complainer, the Sheriff-Substitute refused to convict. His decision will be found fully reported in the *Dundee Law Chronicle*, vol. 2, p. 133. This judgment was wisely acquiesced in, and the proper remedy was taken the very same year by the Act 1844, by expressly mentioning whitling in the enumerated class.

In 1858, a complaint was presented to the Sheriff-Substitute (Grahame) at Dunblane, against a person for taking parrs from the river Allan. There, again, contradictory evidence was given as to whether that fish was of the salmon kind, and the judge dismissed the complaint on similar grounds as the Sheriff-Substitute at Perth had previously done. His able Notes will be found at page 124 of the same volume of the *Law Chronicle*. The fishing proprietors wisely acquiesced, and once more met the difficulty as they did before with smolts. The Act 1862 extended the term salmon so as for the first time to include itself, and also grilse, sea trout, smolts, and parr, and other migratory fish of the salmon kind. Under this extension, there could now be no doubt that, in all sections which impose penalties for interference with salmon, parr is included.

But the Act 1868 introduces a new and highly penal offence, and which goes far beyond the protection of salmon in its advanced stages. It is limited only to one of the enumerated names, "smolts," with the addenda *or* (not *and*) salmon fry, which is merely a designation of smolts. If it was meant to extend the penalty to a farther and undefined extent, and to include parrs or any other class of salmon fry, or the young of salmon, within the clause, and under the prohibition, it should have been so enacted, and the question not left to be ascertained by scientific proofs. Suppose the clause had simply been for the protection of salmon fry, or the young of salmon, without the mention of smolts or any named fish, would it have been permitted that a person could be prosecuted and punished for interference with smolts, parrs, or any other fish which could have been proved by scientific men to be the rising generation of the salmon family, from the ova to the oven? The Sheriff-Substitute, therefore feels himself constrained to repeat his views in the smolt case, confirmed by his brother at Dunblane in the case of the parrs. The simple ground of his judgment is that, in the penal clause founded on, parrs are not mentioned, and he declines to inquire and decide the scientific question, whether salmon parrs are salmon fry or the young of salmon. The proprietors have their remedy by expressly including parrs in the section amongst salmon fry, and to leave no room for escape from the penalty.

It may be added, that the solicitor for the accused urged what appeared in evidence, that his client was not a salmon poacher, or even a habitual fisher, but only on this day had obtained leave of absence, and for that day only had become a disciple of Isaac Walton.

His ignorance of the finny tribe was shown by his frankly classifying the whole of his nine captives under the section of parrs, whilst the more practised eye of "Peter of the Pools" indignantly repudiated four of the number from that high dignity, and placed them under a mongrel species, not of the pure breed. Nevertheless, had the word parr been found in the section libelled, then, whilst such considerations ought to have had their weight and effect with the prosecutor, they could have had none with the judge, farther than in modification of the penalty.

The complainer, Mr. Blair, then presented an appeal to the next ensuing Justiciary Court against the foregoing judgment. His appeal was presented on the 18th October, 1869, and was served by an officer of court on Miller on the same day. The

reasons Mr. Blair embodied in his appeal were these:—(1.) That the expression, “salmon fry,” used in the section of the Act libelled on, and which has frequently been used in Acts of Parliament connected with the Fisheries previous to and since the Act of 1696, “against killers of black fish, and destroyers of the fry and smolts of salmon,” has a well-known and definite meaning, and means simply “the young of salmon,” as mentioned in the marginal note of said section. (2.) That it is now well known, as a matter of fact, that the parr of our salmon rivers are really the young of salmon, or fish of the salmon kind, and in consequence, “parr” have been classed among salmon by the recent Salmon Fishing (Scotland) Act, 1862, which is incorporated with the Act of 1868 libelled on. (3.) The appellant proved that *five* of the fish produced at the trial were the young of the *real salmon*, and that four were the young of other fish of the salmon kind, such as the sea trout, bull trout or whitling, though all these, before arriving at the smolt state, are generally known as parr. (4.) That although proved to be the young of salmon, the Sheriff-Substitute improperly held that this was not equivalent to proving that they were salmon fry. (5.) When the prosecutor desired to re-call his witnesses in order to show that the Sheriff-Substitute misunderstood the nature of the evidence led, the Sheriff refused this, apparently on some mistaken idea that the prosecutor desired to lead, not only additional, but scientific proof. The appellant, however, did not ask for what is commonly understood as “scientific proof,” but merely a re-examination of the witnesses adduced, to clear away doubt as to the facts really proved, seeing there was no record of the evidence taken which could be referred to at the debate, and the statements of the witnesses came to be a

matter of dispute on various points. (6.) The expression "wilfully," used at the commencement of the section of the Act founded on, does not reach or apply to the offence of having smolt or salmon fry "in possession." The Sheriff-Substitute admits that the expression "wilfully" does not override the whole section—how then can it apply to the offence in question, which is stated in the *middle* of a number of other offences, to which the expression does admittedly not apply? Section 20 of the Act is construed in the same manner as applicable to the possession of unclean salmon. (7.) Even although the expression "wilfully" did apply to the offence in question, the respondent could reap no benefit from it in the circumstances proved; for every person fishing in a salmon river must, as the Sheriff-Substitute has himself stated, be held wilfully culpable if he takes and retains possession of forbidden fish. The respondent's habits and experience as a fisher or angler, so gratuitously commented on by the Sheriff-Substitute towards the end of his "note," were points not submitted to probation. (8.) Where the defender pleads his own ignorance, as in this case, to show that he did not take the young salmon or fry "wilfully," and knowing them to be such, if the expression "wilfully," is, in such a case, to be given effect to at all, the proof of ignorance should be thrown on the respondent, as it is impossible, in any case, for the prosecutor to prove the extent of another man's knowledge. The respondent did not show his ignorance, as stated by the Sheriff-Substitute, by classifying the whole nine fish as parr—he was quite right in doing so, and the witnesses for the prosecutor testified to the same fact. But this is one of the many points on which the Sheriff has misunderstood the evidence,



apparently from his own want of knowledge of the distinctions among the "finny tribes."

The appeal was discussed in the Justiciary Court, at Perth, on the 5th May, 1870, by counsel from Edinburgh, when Lord Jerviswoode, one of the judges on the said Circuit, "ordered and adjudged that the judgment complained of in the said appeal be recalled *in hoc statu*, and remitted to the said Sheriff-Substitute to enquire into the several matters raised under the complaint, and thereafter to dispose of the cause, and of the whole matter of expenses so far as not hereinafter dealt with." The appellant was allowed the expenses of the appeal, modified to £5. 5s.

The Sheriff-Substitute, on the 29th June 1870, pronounced an interlocutor applying the remit, and fixed a diet of proof—which was afterwards altered, by consent, for a new diet for the 1st July, 1870. Proof was then led by both the contending parties.

#### P U R S U E R ' S   P R O O F .

IN CAUSA.

BLAIR v. MILLER.

PETER MARSHALL, deponed,—I was examined before with reference to this case. I saw the parr then produced in bottles. There were nine of them. A yellow trout was also produced. With regard to these nine, I consider the bottles with the five fish were the young of the pure salmon, and the other four in the other bottles were the young of the sea or bull trout. I saw the yellow trout. I could easily distinguish them.

Mr. M'LEISH objected to proceeding further, and said the question was whether or not they were "salmon fry."

By Mr. BLAIR.—In regard to the whole nine of these, I classify them under the name of "parr." They are also called the "fry" of salmon. These fish are called "fry" as soon as they come out of the egg, and continue so until they become smolts, and go to the

sea. They don't assume "parr" mark until the end of three months. I have heard "smolt" called fry. This name is applied to them when in multitude; but if I had a single parr before me I wouldn't call it salmon fry. The five were the same as I rear in the pond. I rear pure salmon in the pond. I have compared the parr in the river with those reared in the pond, and I have no doubt in saying, from years of experience, that the young of salmon are salmon fry.

By the SHERIFF.—Some persons call smolts salmon fry.

By Mr. BLAIR.—Smolts at that time assume a silvery colour which they had not before. As soon as they can get to sea they go. They pass through three stages,—(1), when the egg bursts; (2), till the egg forms itself into a bodily shape—that takes six weeks; (3), in another three months it grows into parr; (4), the smolt. In the ova we don't call them salmon fry.

By the SHERIFF.—That is four stages.

By Mr. M'LEISH.—I was a fisher before I went to Stormontfield ponds. I have been there seventeen years. The term "fry" is used as a common term in our district. Smolts are called fry sometimes. I have heard it applied also in England. The fish, after being three months alive, change at the parr stage. The peculiar marks after the change from the parr stage are black marks on the side. Smolts and parr are in the river at the same time. I maintain that parr and smolts are exactly the same species. There is no difference betwixt them. They are bred of the same fish. I have got a pike, a yellow trout, and a minnow in my pond. I do not think fish of different species will spawn together. I have bred grilse and sea trout together. I don't know the result. I have kept parr, to see what progress they made, for five years. They changed into smolts. They were kept in the filtering pond for two years as parr, and at the end of two years they became smolt. I have tried the experiment with a parr. The experiment was merely tried with smolts to see how they would progress.

By the SHERIFF.—They were taken out of the pond and put in the filter.

By Mr. BLAIR.—I am certain I did not breed any pike in the pond.

By the SHERIFF.—The river overflowed into the pond, and I suppose it got in that way.

By Mr. M'LEISH.—There are fish called "parr" of the sea trout, but not of the common trout. The spots on the parr of salmon vary. I have seen eleven, and I have seen as many as sixteen. I

have never counted the number of spots on the parr of trout. It is difficult to tell the difference between the parr of trout. The difference of fin in the yellow trout is that the dead fin is orange, and the other fin is white. I have never seen the parr of sea trout.

By the SHERIFF.—When we talk of yellow trout we never call them “parr”—we merely call them young trout.

By Mr. BLAIR.—When we rear one season's ova, none go the first season after they come out of the ova. They go the next season. About a half of the same hatch only go, and the larger number remain in the river. There will be in the river both parr and smolt of the same year's hatching.

Mr. BROWN, drawing-master, Seminaries, deponed—I pay a good deal of attention to bringing up young salmon. I commenced in the year 1833. I recollect the opening of the Stormontfield ponds. I am there nearly every week. I have frequently marked the fish, and caught them again as grilse. The different stages are—(1) eggs, or ova ; (2) the little fish that comes out of the egg, with a bag ; (3) this bag is absorbed in about six weeks ; (4) then it is the parr. After this, it continues for some time until it becomes a smolt. They become parr sometimes in one year, sometimes in eighteen months, and I have had them for four years before becoming parr. There can be parr and smolt in the river at the same time, and of the same year's breeding. They are called fry after they lose the bag, and until they go down the river. A fish is a parr, or a young fish, until it becomes a grilse or salmon. They are all called “fry” until they leave the river. The name “fry” includes all the stages before the grilse—smolt as well. We have compared the fry in the ponds with those in the river. These parrs which the boys catch in the river are the same as are reared in the ponds. A parr could not go into the sea—it would die in a short time. The parr never makes seaward until it becomes a smolt. You can't tell a parr from a smolt until it has the scales. A man inexperienced may not know a parr from a smolt. It is difficult to know them from the common trout.

By Mr. BLAIR.—It is difficult to distinguish the yellow trout from the parr in different stages. The parrs are very like the burn trout, and might be mistaken by people who do not know.

By the SHERIFF.—I would not confine the word “parr” to salmon species. The young of the common trout is just as much a “parr” as the young of the salmon. The Stormontfield ponds have had them four years before they became smolts. Spawn is when it

comes out of the egg ; and it becomes fry when the fish is able to do for itself—that is, swim about.

DAVID BURNS, farmer, Stanley.—I have had considerable experience with breeding salmon. I was some time in Ireland rearing salmon. We wanted to introduce them into some lakes and rivers. We succeeded. Besides this experience, I have been very much interested in the Stormontfield ponds. I have watched the different stages, and I have found that in about three or four months the shell bursts. After the shell bursts, the parr are very small, and have a bag. Before they absorb the bag—about four or seven weeks afterwards—they are called “parr.” With the bag, they are called “young parr.” If there was one shown me I would call it a “parr;” but if there was a number they would be called “salmon fry.” They are called “fry” until they are grilse. Smolt are also “fry.” This expression is used for young salmon. There is no stage between the smolt and grilse. There is no particular limit to the word “fry,” until they are smolts.

#### *DEFENDER'S PROOF.*

WILLIAM CLEMENT deponed—I reside at Alva. I have been a fisher for upwards of thirty years. I have studied the habits of salmon for the last twenty years. I know the fish called “parr.” It is quite a different fish from smolt, and is not produced from the same parentage. I know this by an experiment which I made. I have kept them in a well for eight years. They did not grow larger. They kept about the same size and fatness. I tried the same experiment with smolts. They did not do so well. They grew long and thin. Their habits were different from parr. My opinion was that smolts required to migrate. It is my opinion that “fry” are not young salmon.

By Mr. BLAIR.—It is my opinion that parr are the young of yellow and sea trout. I have seen a yellow trout and sea trout spawning together, and from that circumstance I came to the conclusion that parr were the young of these trout.

By the SHERIFF.—My opinion is that there are no parr of salmon on any river.

PETER M'NEIL deponed—I reside in Perth. I have been acquainted with fishing for about thirty years. I am known as the “Otter,” on account of my fondness of fishing. I know all the

habits of fish. I know the fish I call a *parr*. A *parr* never changes into a smolt. It remains a *parr*, but of different sizes. I never considered it the young of salmon.

By Mr BLAIR.—I have not watched the progress of the growth of a *parr*.

By the SHERIFF.—My opinion is, that they become smolts when they come out of the egg. I have seen the yellow trout spawn with the *parr*.

By Mr. M'LEISH.—I call salmon fry "salmon smolt." I never call them "*parr*."

JAMES VOY, Pomarium, Perth, deponed—I know about salmon and their habits. I have been engaged both in line and net fishing for five years. I have had experience of thirty-two years in net fishing. I know a *parr* quite well. *Parr* and smolt are not the same kind of fish. Salmon fry I call the smolt. *Parr* are not salmon fry. I have opened *parr*, and found roe in the female and milt in the male.

By Mr. BLAIR.—I have seen the milt developed to its full state. I was quite satisfied it was roe. I have seen a good many *parr* with roe. There might be more with the milt than the roe. I have not seen any of these *parr* reared from the egg. I have seen them different sizes, but all *parr*. You can know a smolt by the colour, the head, and the flesh. There is a certain season in the year when smolt have got a silvery coat. It is only at this stage that I know them to be smolts.

By the SHERIFF.—It is my opinion that *parr* are the produce of bull trout. I am quite certain that there are male and female *parr*.

By Mr. M'LEISH.—I never knew of a smolt having roe and milt. Roe or milt appears in a smolt for the first time when it comes from the sea. I would not be positive of finding *parr* in the spring with milt. I have found milt and roe in them in November and December.

ROBERT HAGGART, deponed—I live in Perth. I have fished for forty-five years. I know the *parr* well. I know smolt also. The *parr* and the smolt are not the same. *Parr* are not salmon fry. Salmon fry are the smolts going down to the Tay from the breeding ponds. I have got both milt and roe in the *parr*. I have got them in February with milt and roe in them. I have never examined smolts. I never heard of milt and roe being in smolts.

By Mr. BLAIR.—The smolts are different sizes. On an average they would be fully less than my finger in length. They can be known by the head before the scales come on. The scales come off

smolts very easily. They are not so dark as the ordinary parr. The marks are almost the same. I have seen these fish in the ponds. I would not call the fish in the ponds "parr." I would call them smolts. I would call all the young salmon smolts from the time they come out of the egg until they go down the river. I have never heard of milt or roe being in a smolt, but I have seen them in a parr.

By the SHERIFF.—A smolt would become a grilse, and a grilse a salmon. There are male and female salmon. I could not say much about how a smolt became a grilse, because that is done down the water. (Laughter.) Parr don't grow out of the parr stage.

ALEX. MACDONALD, dyer, Perth.—I have been fishing less or more all my life. I know the parr. They are different from smolts. The term "salmon fry" applies to smolts. I never heard it applied to parr. I have been once at the Stormontfield ponds. I had some conversation with Mr. Marshall. He said that the bank had been broke down, and that the parr could not get in. I understood that he tried to keep the parr out of the pond,

JOHN CROW, weaver, Leonard Street, Perth.—I have been a fisher for upwards of twenty years. I know both parr and smolt. They are different species. I have felt a smolt and parr. A parr at the present season has a milt and roe. Salmon fry are smolts. I have caught parr larger than smolts. I never heard the term "fry" used with regard to parr.

By Mr. BLAIR.—I catch the smolt in April. They vary in size. They must be in the river before that time. You will find parr in all seasons in the river, while you will find smolt only in their season. I can't believe the smolts to have been parr. I once got a parr quite black, and I considered him a foul fish and a matured fish.

THOMAS BELL, weaver, Perth, deponed,—I have been a fisher for upwards of forty years. I know about salmon. I know smolts. Salmon fry are smolts. Parr are not smolts. The term salmon fry has always been applied to smolts. At a certain season there are no smolts; but you will get parr all the year round in the river. I have seen parr go in shoals. Parr approach in their habits to those of the yellow trout. I don't know whether the smolts went down the river in shoals.

By Mr. BLAIR.—I have never fished in burns where salmon could not get. I was not aware that parr are only got in rivers where salmon are found. The smolt are only in the river a short time in the spring. I have always found the parr the whole season over. I

have never considered that smolts were parr the year before they went down the river. I have seen parr and smolt in the river at the same time, [The foregoing notes have been taken from the *Dundee Advertiser*, dated 11th July, 1870.]

The Sheriff-Substitute heard parties' procurators on the evidence led, and on the 12th July, 1870, pronounced judgment, appending a note of his views thereto.

PERTH, 12th July, 1870.—Having taken proofs for the prosecution and the defence, heard parties' procurators thereon, and made avizandum with the proofs and whole proceedings,—Finds it not proved that, in the popular and well understood sense, any of the parrs found in possession of the accused on the day libelled were "salmon fry." Therefore finds the complaint not proved, and dismisses the same; decerns against the complainer in favour of the accused for expenses, and the expense of extract.

*Note.*—The remit from the Appeal Court did not specify the issue which the Sheriff-Substitute was now to try. The parties agreed that it was simply whether the parrs, or any of their number, found in possession of the accused, time and place libelled, were "salmon fry," so as to bring him under the penal section of the statute. The complainer adduced three witnesses—the first, the keeper of the breeding beds or ponds at Stormontfield; the second, Mr. Brown, of the Perth Academy, an enthusiastic fisher, and writer of the natural history of the salmon; the third had been a practical or professional fisher both in Scotland and in Ireland. All these three agreed that parrs were the young or "fry of salmon." The details of their testimony were, that salmon escaping from the egg carry with them, for a period of about four months, an appendage of a bag, which they then absorb, and assume the status and name of parr. In this state their term of existence is varied—some remaining in the river for one, two, three, and even four years. They then assume the scaly form of smolts, and go to sea, to return next year as grilse. So soon as they emerge from the egg, they are termed fry or parr. They continue until they step into the class of smolts. Parrs, however, are not limited to the young of salmon, either in name or in fact. Sea trout, yellow trout, and bull trout also have their respective parrs, and it is sometimes not easy to distinguish members of the three families, the one from the other. One of these classes does not fall within the salmon tribe. The witnesses

for the prosecution stated that parr, when single and solitary, termed "parr," but when in numbers, they receive the name of "fry," as correctly designated by lexicographers. Something, however little, may be set against the weight of the evidence of the complainant's witnesses, in so far as their experiments were chiefly made with ova and its products in ponds and wells, and not in a running stream, which it may be supposed is the more natural *habitats* of fish, and to which the witnesses of the defender had their attention solely directed. For the defence, there were *seven* witnesses, who were all more or less enthusiastic fishers of long and great experience, and they were all of decided opinion that the parr was a distinct fish, not owing its parentage to the salmon, and, of course, not by any process of development metamorphosed into that fish. They formed their opinion, not on the nice experiments of the complainant's first two witnesses, but chiefly on one ground, that parrs were found in the river all the year round, and did not migrate, whilst smolts were only seen in the river at a particular season in spring; also, that sexual organs were seen developed in the parr. They all agreed that in popular language parrs, which are of different classes, are never called or known as the young of salmon, or "salmon fry," but simply and distinctly as "parr." The Sheriff-Substitute keeps steadily in his view the grand recognised principle, that penal statutes are always strictly interpreted for the offence, and liberally for the alleged offender, and that wherever there is a doubt it must be given in favour of the alleged culprit. If the Sheriff-Substitute were now called on to decide the question as a naturalist seated in the academical chair, he must confess he would yield to the weight of the testimony given for the complainant; that evidence, founded on long and minute experiments by experts, would have led him to decide, as a point of science, that parr, or at least certain of that family, were the young of salmon. At all events, there was sufficient evidence to throw great and grave doubts on the opposite position, that they were all a separate class of one finny tribe. He therefore might, even in the scientific view, have found it safer to leave it, as, until lately, it was even by naturalists held to be an open question in science. But sitting as he does as judge, interpreting a highly penal statute, the strong evidence on the other side has forcibly led him to the conclusion that, in popular opinion and language, parr is still held a distinct species of fish, and not of the salmon kind. He cannot bring himself to settle a scientific question at the expense of the unfortunate defender, who, as well as his seven witnesses, and it is believed the general and



unscientific public, are not yet educated up to the high and nice standard of development of species. It was monstrous to punish Gallileo, the astronomer, for denouncing the popular opinion by setting up his own correct theory of the solar system; but it would have been still more monstrous in those days to have punished any of the general public for adhering to the incorrect opinion of Ptolemy which they had been taught and believed from generation to generation. The question here raised is not unlike that in the celebrated Torbanshill case, where a lease of coal was sought to be set aside because that some scientific men were of opinion that the substance actually found underground was not precisely elementary coal, as popularly understood, but some bituminous matter of a different kind and greatly enhanced value. Both the jury and the judges, notwithstanding a host of scientific witnesses, repudiated such nice distinctions, and sustained the lease. Lord Rutherford well observed—"We are not contending about what is the proper definition of coal, or about what the true components of coal are. These are matters of natural history. The question is, 'What was let under this lease?'" This may be thus well parodied in this case—"We are not here contending whether parr is, or is not, salmon fry, or the young of salmon. That is a question of natural history. The question is, Whether parr is under the statute declared salmon fry, or the young of salmon?" If such rule of interpretation was followed in a civil suit, much more ought it to prevail in a criminal prosecution. Parr is otherwise mentioned distinctly, and protected in other clauses of the statute, but not here; and it follows that the framer of the statute knew of their existence, but did not intend them to be included in this highly penal clause. The salmon proprietors can easily remove the difficulty in the next of their long statutory series, by expressly naming parr in this penal clause. It will not do, in this age and country, to imitate the example of the Roman emperor, who had his penal edicts in so small characters, and elevated in so high positions, that the people could not read them, and so, of necessity, offended in ignorance, to the benefit of the public treasury. The Sheriff-Substitute refers to the opinions expressed in his former notes, to which he still, with deference, adheres; and he has only to add, that he has decided the case judicially, and entirely on the evidence. Unfortunately, perhaps, for himself, he never had sufficient time, and perhaps taste, to cultivate the piscatorial art, and therefore he has no personal knowledge on the subject, no strong prejudice to disabuse, nor any particular predilection or theory to gratify.

The foregoing judgment led to another appeal to the Justiciary Court, at Mr. Blair's instance. He appealed on the 20th of July, 1870. It was served on the 24th July 1870. The reasons embodied in the appeal itself are the following :—

(1.) That the appellant having proved, by competent witnesses, that the fish found in the possession of the respondent were parrs, and were the young of salmon, or salmon fry, the Sheriff-Substitute ought to have given effect to said proof by a judgment against the respondent. (2.) That the prevailing popular ignorance in regard to parr being salmon fry did not warrant the Sheriff-Substitute in refusing to apply and give effect to the Act of Parliament libelled, to the prejudice of the important interests designed to be protected by the Legislature in said Act.

The hearing of the second appeal took place at Perth on the 7th September, 1870, before the Right Honourable the Lord Justice Clerk (Moncrieff) and Lord Cowan, one of the Lords Commissioners of Justiciary, and their lordships, after hearing counsel for both parties, "Found the complaint proved, convicted and hereby convict the respondent of the contravention complained of, and adjudged and hereby adjudge him to forfeit and pay to the appellant the sum of nine shillings for the fish had by the respondent in his possession, being one shilling for each fish: Found and hereby find neither party entitled to expenses, and decerned and hereby decerns."

Doctor Barclay, on this judgment being pronounced, recorded his *additional* views in a legal periodical as follows :—

*Note.*—"Apart from the important questions on the merits involved in the Circuit decision, there are some matters of legal principle and form which admit of grave consideration. 1st.—The

Circuit Judges for the *first time* have convicted for statutory penalties, contrary to the well known opinion expressed by the whole court, under a remit from the House of Lords "that the Court of Session have not, by the law of Scotland, power to find a defender liable in penalties, such defender not being convicted before a Justice of Peace. 25 June, 1838, *Morrison v. Mitchell*." 2nd.—The clause founded on and complaint only authorised *one* penalty for the offence, but the Judges awarded penalties for each fish. 3rd.—The statute authorised *one* special mode of recovery by *imprisonment*, but the Judges authorise the common law mode of recovery by *Poinning*. 4th.—A penalty is imposed for *nine* fish, whereas only *five* were proved to be parr. And lastly, the Judges proceeded solely on the interpretation clause, which includes parr under the class of salmon, but so also is bull trout, and therefore bull trout are now judicially held to be salmon fry besides the class libelled (which extends the offence over the whole year) namely smolts, which being also included in the interpretation clause did not require to be separately named as salmon fry according to the views expressed by the Judges.—*Journal Jurisprudence*, vol. 14, p. 625.

The Sheriff was well entitled to doubt of the prudence of attempting, in a law court, to decide a disputed question relating to natural history, and that notwithstanding what is contained in the *Quarterly Review*, *Edinburgh Review*, &c. Were these effusions not the work of Mr. Russel, editor of the *Scotsman*? To his book, entitled *The Salmon*, published in 1864 by Edmonston & Douglas, Edinburgh, there is a note attached in these words:—"Note.—Portions of this volume have appeared in the *Quarterly Review*, *Blackwood's Magazine*, the *Edinburgh Review*, and the *Scotsman*. *Scotsman Office*, Edinburgh, May, 1864." Mr. Russel refers both to Mr. Hogg's and Mr. Buist's sentiments. We see that Mr. Hogg's novel theory of parrs being the fry of salmon astonished Mr. Buist in no ordinary degree; so he deliberately wrote in the *Quarterly Journal of Agriculture* for March, 1832,—"This theory has not only astonished me, but many a veteran fisher

and angler in the Tay, and I dare say it has done so in the other rivers of Scotland. I shall examine Mr. Hogg's experiments, to prove his theory by and by. In the meantime I may observe that the little fish known as a parr with us, though very like the smolt in appearance, yet differs from it in many essential particulars ; " and then he goes on with his examination, and finds the theory of shepherd Hogg to be " nonsense," and " quite heretical," so much so that " on the 26th Nov. this year, I had a full grown healthy parr, with firm scales, brought to me by one of our men who watch the river. It was taken off a set line, and was come to full maturity for spawning, as the milt was running from it like milk. Had a ' Cockney angler ' caught this fish in May, he might have mistaken it for a smolt, as it was so like one in many respects ; but the time of year it was taken proves without the shadow of a doubt its identity as a parr." Mr. Buist had been, before 1832, more than " twenty years extensively concerned in the Tay and other fisheries," so his opinions were not those of a novice.

Thus ended the judicial combat betwixt Miller and the Tay District Board. He did not fare so well as the Stormontfield fish, which were fed, as appears by Mr. Russel's book (p. 49), regularly with " boiled liver rubbed small," besides their natural supplies from the surface and the bottom. No wonder that a host of trout and true parr should swim about the entrances to the Stormontfield pond, and dart in when an opportunity offered. Nor would it have been a great wonder if the members of the swell mob in London visited the pond, when no less than 800 silver rings were inserted into as many fish (so Mr. Russel relates, p. 55). None of these fish were ever got from the sea—their silver ornaments no

doubt proved fatal to them. If any member of the legislature is desirous of finding reasons for being cautious in legislating on the vexed fish questions, the 2nd chapter of Mr. Russel's book can safely be recommended as a manual just suited to that end. At page 51 we find this—"On the 2nd of May, 1855," (*i.e.* when, on the one year hypothesis, the time of migration had arrived,) "the fish in the ponds were examined by a highly competent committee, including Lord Mansfield and the late Mr. James Wilson the naturalist, and the decision was that they were *not* ready to descend. But on the 19th of the same month, there was a meeting of a portion of the committee, at which it was agreed the fish *were* ready to descend." The eulogy given by Mr. Russel to Mr. Buist, (page 58), is quite as consistent as all the rest—"These facts have been most carefully noted and clearly recorded by Mr. Robert Buist, of Perth, a gentleman who, from his long experience, his powers of observing, and his caution in coming to decisions, has done much service in the matter of salmon, both as to natural history and commercial interests." It is a pity Mr. Russel did not add that Mr. Buist had the status of a *lessee of salmon fishings* in the Island of Skye when he took such a lively interest in the Stormontfield pond; and it is more to be regretted that the diversity of opinion betwixt Mr. Buist and Mr. Hogg, the Ettrick Shepherd, on the parr question, was not shortly related. It occurred before Mr. Buist was appointed superintendent of the Stormontfield ponds. The men whom Mr. Russel likes to deal with seem to be Mr. Andrew Young, of Ivershin, and Mr. Mackenzie, of Dundonnell; and on the devoted head of the latter he cruelly pours such a flood of arithmetical calculations and tabulated figures as would frighten any one except a

second Sir Isaac Newton. The opinions of these gentlemen on the parr and grilse questions are held by Mr. Russel to be "most heretical and unnecessarily contentious," ranking in perversity next to "theology," which he deems to be fruitful in disputes. The charms of divinity have evidently no attractions for him. Why theology should have been so selected, however, is not very clear, because physic and law are quite as open to debates of all sorts, and quarrels likewise, as theology, although they may not have "the baker's wife in 'Candide,'" (page 58) and a "Scotch Minister on a catechizing raid," (page 62), to blow the flames. Great was the astonishment and just the indignation of the baker's wife of "Candide" on hearing that there was a man down stairs who hesitated to declare his belief in the fact of the Pope being Anti-Christ, but what was that display of unbelief to some which we are doomed to witness in this bold and sceptical age. Here was a man—a man of Ross—who actually hesitated to declare his belief in the popular and accepted fact of a grilse being a young salmon. Nay, worse, that luckless prig "Candide" did not in dealing with the baker's wife, venture on any counter proposition, but simply declined to enter on the catholic question at all, on the preposterous plea (destructive of half the controversies which enliven the world) that he knew nothing about it, whilst he did know he was starving, and that the lady's husband was a baker whom he had just heard make an elegant speech in praise of charity. But our heretical friend, Mr. Mackenzie, of Dundonnell, went the length of an entire denial of the orthodox ichthyological creed, and greatly aggravated his offence by showing that he did not know a good deal about the matter regarding which he had arrived at such unhappy opinions.

facts is correct." He, however, paid that gentleman the compliment of styling the passage above quoted a specimen of clear analysis and elegant English. (See *Edinburgh Courant*, Monday, 20th May, 1878.)

But does the condemnation by this American citizen, of the carelessness of writers of articles in the *Encyclopædia Britannica*, stand alone? It does not. Let any person turn to Mr. McLeod's *Book on Banking*, vol. 1, p. 299, and he will find stronger language still against negligent information finding a place in a work once of so high repute. Mr. McLeod quotes first the words of a writer on "Credit," and then he remarks thereon, "When we see such gross, dense, *crassa ignorantia* in a publication of the character and pretensions of the *Encyclopædia Britannica*, what are we to expect from the general public?"

It would further appear, from Mr. Russel's work, that Parliamentary Committees have been the repositories of very questionable information about salmon. "The nonsense about the salmon that has been published under the name of natural history, and thrust down the throats of Parliamentary Committees, is, when looked back upon, appalling in amount, variety, and worthlessness." (page 82). These learned bodies must feel highly delighted with such a complimentary notice of their powers of discrimination, and will feel disposed hereafter to take their abode in the "subaqueous residence" adverted to by Mr. Russel; or they may think that Mr. Russel should have remembered the weighty words of as an acute controversialist as ever lived,—"There being no more certain sign that a point is not evident, than that honest and understanding men, and such as give themselves liberty of judgment after a mature consideration of the

matter, differ about it" (Chillingworth's works, vol. 1, p. 82—Oxford edition). If they adopt Chillingworth's sentiments, they will have none of Mr. Russel's "visionary theories," "narrow empiricism," "stiff assertions," "easy credulity," and "obstinate unbelief" (page 32). When they take up their abode in the "subaqueous residence," they will, probably, be only stiff in their *bodies*, and *watery* in their theories. Then will be the time for Mr. Russel to throw down the gauntlet, in feudal style, and exclaim, "We defy any man to find a parr in a river to which salmon have not access, or a salmon in a river where there are no parrs" (p. 38). He will have the field to himself, and sing merrily, "where there are no salmon there are no parr, and *rice versa*" (p. 38); and, "where there are no salmon there are no grilse, and where there *are* salmon there are grilse, and *vice versa*." Mr. Shaw of Drumlanrig and he will dance the reel of Tullouchgorum to their own music, and the one-year and two-year theories of migration will be buried in oblivion, unless, indeed, Mr. Mackenzie, the "Ross-shire laird," in pure vexation "seeks to gain an undying, if undesirable reputation by setting fire to the Tay, the Tweed, and all other salmon rivers" (p. 59), and so spoiling the pleasure of so favourite a dance, which would be a very naughty act on his part. It would bring up the dancers "with a jerk" (p. 58). In the event of such a frightful catastrophe, the salmon proprietors would stand no chance of making profits such as those described in these words of Mr. Russel—"The larger section of the proprietors and their lessees have been, or at least were until the recent legislation, going on competing with each other who should kill most and spare least, careless of the future." As little need would there be for the



“ useful little bill ” of 1863 (26 Vict., cap, 10), prohibiting the exportation of salmon at certain times,” because, when all the rivers were on fire, there would be nothing but *broiled* fish—not exportable. The salmon have a severe time of it, for “ it appears from the returns, that, measured by value, just about as much salmon was wont to be exported during the illegal as during the legal season ; and as the value of foul fish as compared with clean is seldom more than one-fifth, it would appear that by far the greater part of the salmon consisted of fish taken in the breeding season, and in the most unwholesome condition, besides having been stolen from the fishery owners, and in violation of laws designed to preserve from extinction a valuable article of food ” (p. 177). This extract is no subject of merriment. The proceeding described is much to be deplored. It proves beyond cavil that vulgar, uneducated and desperate poachers, or idle vagrant poor, are not the only illegal destroyers of fish, but that there are men of place and quality so engaged in the work of destruction. It will not do, however, because one act of illegality is committed, or many acts of that sort, by private people, for the Crown rights to be so used as to exterminate these evil-doers by other acts on the part of the Crown of equal destructiveness, which appears to be the substance of Mr. Russel's book at pp. 197, 198, 199, 200, and 201. Here it is pertinent enough to ask,—Is Mr. Russel a *disinterested party* in the parr and salmon controversy? Judging from what follows, one would say not. The *Saturday Review* has a notice of Mr. Russel's book, which, *inter alia*, has these words,—“ He is a veteran writer, the editor of the *Scotsman*, a veteran angler, and is believed to have had a leading share, in company with the Duke of

Another writer, however, is just as confident that the salmon follow the herring, "upon whom they feed to a considerable extent; and as the latter periodically leave our shores for the polar seas, it may, with some probability, be concluded that the migratory abode of the salmon is in the same region." It is wonderful to see the strong grounds some men possess for excusing their attempts to overthrow the established course of nature's laws. To mutilate fish with impunity is the privilege of only a few, including Mr. Buist. "The only other plan, therefore, which we could adopt, was *excision*, and the only part we could sever with safety to the fish, was the dead fin, as the part of the body which we thought the fish could spare without injury, and which we have proved was not renewed." Here "we" stands in direct antagonism to the Great Creator of all things, who thought *the fin was necessary*, but which Mr. Buist and his friends think *unnecessary*. Mr. Buist's opinions of fish are diverse. As has been already said, he held at one time the opinion that a parr was a distinct species from the salmon. He fought with the Ettrick Shepherd on the point. In 1853, however, he was *entrusted with the Stormontfield breeding pond*. Then he nimbly changed his mind, and made parr salmon, and salmon parr. Mr. Buist, in short, from that time became "Peter of the Pools;" and Mr. Shaw of Drumlanrig going hand-in-hand with him, expelled the midnight darkness which enveloped the natural history of the salmon. But was Mr. Hogg free of the tergiversation exhibited by Mr. Buist? No; he at one time held parr not to be the young of salmon, and was converted by Mr. Scrope; and in turn that gentleman was converted by Mr. Shaw, of Drumlanrig; so that there was a nice circumlocution jig among them. Mr. Scrope

writes,—“ The late Mr. James Hogg, the Ettrick Shepherd, was particularly stiff and bristly in opinion against me ; but he recanted afterwards. I suppose it would have been better for my credit had I abstained from any colloquy with the said James, which appears not to have been particularly entertaining ; for lately, upon asking my friend Sir Adam Ferguson if he recollected the circumstances : ‘ Perfectly well,’ said he, ‘ and it was at your own table ; but I cannot say who had the best of the argument, as I *fell asleep soon after it began.*’ ”

But to return to Mr. Buist and his new publication in 1866, published by Edmonston and Douglas, Edinburgh. At page 26 appears the following letter to the editor of the *Field* London newspaper :—

To the Editor of the *Field*.

“ SIR,

“ I sent you to-night, by the Glasgow and South Western Railway, from Lochwinnoch station, a parcel (carriage paid), and which, I hope will be delivered to you to-morrow. It contains a very interesting fish, and one which, I think, will set at rest all the nonsense that has been written about salmon living in fresh water without visiting the sea.

“ Four years ago, I informed you that I had got from Stormontfield some salmon parr, which had not put on the smolt dress and gone down with the rest of the two-year-old migration. This is one of those fish. He is long enough to be 3lbs. weight, and he only weighs 1lb. and yet has been in a pond where two-year-old grayling weigh 1lb., showing that he had not suffered from want of feeding.

“ There may have been many instances of so-called parr being confined for years in fresh water, but I think this is the first well-authenticated case of fish that were, beyond possibility of doubt, ‘ salmon parr,’ being kept confined to fresh water for six years. He was only killed to-day at five o’clock, and ought to reach you in good time for testing his edible quality, which I expect will prove very poor.

“ I hope Mr. Francis is at home to see the fish ; if not, that you

will submit it to some expert in fish, and have its weight, length, and girth accurately chronicled, as I had not the opportunity of doing it before sending off.

GEORGE ANDERSON.

Western Club, Glasgow, *June 20th.*"

The reader will better peruse carefully the proof led in the Dunblane case before he falls into bondage to the face and fancy of Mr. George Anderson, and particularly the notes of evidence in July, 1870, taken in the Perth case, and reflect on the *facility* with which *different sorts of fish* might have been carried into the pond when the river was so flooded as to run over the surface of the pond. It is more probable he had true parr and trout parr than "salmon parr." Mr. Anderson's premises are as weak as his conclusions; the matters he writes of are not as evident as mathematical principles.

Mr. Buist does not hesitate to print and publish that there was, by the Salmon Act of 1828, "destroyed *legally* more breeding fish than by all the poachers put together." Then think of the sea-gulls—one being shot, there was taken out of its maw "upwards of fifty of our young fish." But the long-legged heron is equally cruel, for the keeper's gun having brought one down which was "stalking about among the fry and gobbling them up," he vomited when dying "fifty of our fry;" and, what is more lamentable still, "700 or 800 salmon eggs have been taken out of a trout's gullet in a morning." Anything more shameful can hardly be conceived, except the depredations of yellow trout, which are absolute gluttons. From the stomach of a yellow trout, "I have seen," says Mr. Buist "not fewer than ten full-grown parrs cut out." Is Mr. Buist so artless as to imagine

the Divine Creator has not provided for all that waste, although inscrutable to human eyes, and improbable to our imaginations ?

The next law-suit is that of the Tay District Board against James Shepherd, fishmonger, Perth, for selling salmon irregularly, as it was alleged. Mr. Blair, writer, prosecuted, and Mr. R. Mitchell, writer, Perth, acted for defendant. The Sheriff-Substitute's Interlocutor and Note fully explain the nature of the action.

A case both novel and interesting to Waltonians was decided by Sheriff Barclay on Friday. The Tay District Board prosecuted Mr. James Shepherd, fishmonger, Perth, for "exposing to sale or having in his possession a salmon on the 8th October last," being without the period allowed by the Act for fishing with net and coble, but within that allowed for fishing with rod and line. Mr. Blair conducted the prosecution, and Mr. R. Mitchell the defence. Two witnesses were examined for the accused, who proved that the salmon had been caught by the rod and line on the 5th October last, and on that day sold to Shepherd. This, along with the accused's admission that he had exposed the fish for sale on the day libelled, constituted the whole evidence adduced on both sides, and the decision mainly turned on the interpretation to be given to the 21st section of the Act of 1868. The Sheriff has sustained the argument submitted for the defender by the following judgment :—

Having heard parties' procurators, and made avizandum with the proof and proceedings : Finds it proved that the fish charged in the complaint and admitted by the defender in the defence to have been exposed by him for sale on the 8th day of October last, had been caught by rod and line upon the 5th day of that month : Finds under the Act founded on in the complaint, and relative previous statutes, the annual open time is extended to a period embracing the said dates to the effect of fishing by rod and line ; and in no part of any of the statutes is it declared illegal to sell or buy or expose for sale salmon so caught : therefore dismisses the complaint and the accused *simpliciter* from the bar, and decerns in his favour for £1 sterling of costs, with the expense of extract.

(Signed) HUGH BARCLAY.

*Note.*—The defender (a regular fishmonger) admitted that he had a salmon openly exposed for sale in his sale shop on date libelled. On the other hand, the complainer was obliged to concede that the salmon so exposed for sale had that day been proved to have been caught by rod and line within the extended time, but he maintained that, whilst the statute gave the privilege of capture, it rendered it illegal to sell or buy salmon so caught.

The Sheriff-Substitute, adopting the principle that all privileges are to be literally and all penalties strictly interpreted, cannot read the statute in the manner maintained for the prosecution. The prosecutor maintains that the 21st section of the Act libelled applies to all time beyond the last day of the open season for fishing by net and coble. Under this reading of the statute he was obliged to admit that, according to the strict letter of the law, whilst it was lawful to catch salmon by net and coble up to twelve o'clock of the last open day, it was illegal to have salmon so caught in possession or exposed to sale any time beyond that hour. Even the process of kiperping did not avail to avoid the penalty. All salmon so unfortunately caught, in this view, must be returned to their native element; at least, they can no longer be bought and sold. According to the same reading, he must farther admit that, whilst it is made legal to *catch* salmon by rod and line during the extended period, it is *il-legal to have the captured fish in possession*, or to sell and buy them.—No doubt in the first state of facts, he protected himself on the principle of "necessity and mercy," which qualifies the fourth of the decalogue, and might be extended to modify so extraordinary a provision, but he stoutly maintained that to sell and buy salmon taken by rod and line was strictly illegal. Upon the same principle "possession," expressly forbidden by the same clause, must be also illegal, and so therefore the rod-fisher must instantly return all the fish caught to their native water. But the complainer mildly conceded that a person could scarcely catch a fish without having it in his possession, though certainly the draftsman of the statute held a contrary opinion. The complainer generously conceding that the fortunate fisher might himself eat if the quantity were not of unreasonable amount, and his stomach of sufficient capacity, his own fish; and, still more, he generously admitted that the fisher might perhaps give a superabundance to his friends; but on no account had he right to sell a fish for the benefit of the general public. Of course, it follows that should the accused be held liable in the penalty for buying the forbidden fish, much more ought the fisher be liable for selling the animal, seeing he was the chief

offender; and the unfortunate middleman, who ran the blockade by carrying the fish, would be liable in a third penalty for the temporary possession.

The Sheriff-Substitute cannot put so judaical an interpretation upon an Act of the British Parliament. He is inclined to read the statute according to the standard of common sense. He therefore is of opinion that there are two annual open seasons, or rather one whole, ending on the Tay upon the 10th October, but divisible into two portions, as defined in the schedule annexed to the Act, 1868. During the prior division, salmon may be taken by net and coble, or any other legal mode; and during the second period salmon can only be taken by rod and line, exclusive of any other mode, however legal at other times. He is decidedly of opinion that salmon legally taken during either of these periods must be equally dealt with as well in the one period as in the other. The Legislature intended to give an extension of privilege to the public, and if it was intended to restrict that privilege in so material a degree as in fact to destroy the benefit, it would have been easy in the very same clause which gave the privilege to express the restriction thereon, and not leave it to be hunted out, as was this day ingeniously and ably done by the complainer, by placing one clause of one Act over against another of another, and thus spelling out a highly penal enactment which would require a skilled lawyer to discover and comprehend, but to the general public was a sealed book or dead letter. It may be that the person who caught the salmon libelled, even though he had not sold it, would have been liable to the penalty for trespass on the property of salmon fishings. This applies to all the year round, irrespective of either closetime. This will be a sufficient surety against the abuse of rod-fishing, with the additional precaution adopted in this case of laying on the accused party the burden of proving that the fish, the subject of charge, was caught in the manner declared legal for the time. Be this, however, as it may, because a person is clearly liable in one penalty for a well-defined and well-known offence, that can never justify his being punished for another and distinct act, which can be only brought within the statute as an offence by a long train of reasoning and inference. If this be true with regard to the actual taker of the fish, then much more must it be in the case of the accused party who had no share in the capture, but in the course of his business openly dealt with the staple article of his traffic. His *bona fides* and ignorance of the law were shown in that he had the fish openly displayed in his window, ticketed with the price per pound weight.

(Intld.) H. B.

The above case was appealed by Mr. Blair to the next ensuing Perth Circuit Court, and the then presiding judges, Lord Ardmillan and Lord Neaves, after hearing Counsel for the Tay District Board, on 12th April, 1871, upheld Sheriff Barclay's judgment, and dismissed the appeal.—(See *Cooper's Justiciary Reports*, vol. 2, p. 28.)

We will now conclude the law reports with the case of the Forth Fishery Board against the Rev. George Clerk Renton, Bridge of Allan, which was heard before, and decided by, Sheriff Grahame of Dunblane, in June, 1872, and which created a very great deal of public excitement. It is given *in extenso*, and is taken from the *Stirling Journal and Advertiser*, the manager of which says it is a correct report, and he believes Sheriff Grahame revised the printed proof sheets of his judgment.

## THE "YELLOW FIN" CASE.

TUESDAY, 4TH JUNE, 1872.

To-day, in the Sheriff Court House, Dunblane, before Sheriff Grahame, the Rev. George Clerk Renton, Bridge of Allan, was charged, at the instance of the Forth Fishery Board, with contravening the 19th section of the Salmon Fisheries Act (1868), in so far as, on the 24th April last, he did, on the right bank of the River Allan, a tributary of the Forth, a short distance above the mill of Keir, in the parish of Dunblane, by means of a rod and line, or by some other means to the complainer unknown, take, or have within his possession, six or thereby smolts or salmon fry, whereby he rendered himself liable to a penalty of £5. The offence was aggravated by a previous conviction. Mr. J. W. Barty, writer, Dunblane, appeared for the prosecution; Mr. J. H. A. Macdonald, advocate, for the defence. Mr. Renton pleaded not guilty. The first witness called for the prosecutors was

ALEXANDER TAIT, river watcher, Stirling, in the employment of the Forth Fishery Board, who deposed that he saw the defendant at the place and on the day libelled fishing up the Allan with rod



and line. Cameron was with witness. They saw Mr. Renton catch three yellow fins and several yellow trout. He knew the yellow fins by their silvery appearance. He was 20 or 25 yards from Mr. Renton at the time. Cameron remained, and witness went round by Kippenross bridge, and came up with defendant below the mill of Keir. He was then fishing down the river. He had a bag of two compartments, and in one of these there were several yellow trout, and in an inner compartment three yellow fins. Witness asked to see what he had caught. He first showed the yellow trout, first saying that these were all he had got; but when asked about the yellow fins, he said they were red spots or yellow trout. Cameron came up, and subsequently took six yellow fins out of the separate compartment from that in which the yellow trout were. Seized the rod and line and the six fish, and handed them over to Superintendent Napier. Had caught fish, the same as those seized, in the tidal waters of the Forth—down at Kincardine, 30 miles by the river from Stirling.

By Mr. MACDONALD.—Did not examine each trout separately, and he did not know how many trout were in the bag altogether. Never took out the yellow trout. He knew the yellow fins to be young sea trout because of their silvery appearance, and of a pearly white on the belly fins and the vent fins. The back of the fish is not the same, there being blue rays on the back. The gills are covered with silvery scales. Knew all these particulars before he seized these fish. He had learned them from Mr. Cameron and Superintendent Napier. He did not recollect yellow fins being commonly taken in this district up till two years ago. He first got instructions to seize the rods and lines of people who caught yellow fins two years ago from the Superintendent. Ever since he joined the river police, he considered that yellow fins were smolts, and he did not know of any persons being in the habit of taking these fish. The yellow fins had a pearly hue on the belly and vent fins, but the vent fins were not the same as those of the salmon smolt. The front fins of the salmon smolt had dark rays on them, but these fins on the yellow fin had an orange hue. Salmon fry he understood to mean the smolt of the salmon proper. The yellow fin was the sea trout smolt. He had heard them called, first, the smolt of the sea trout by Mr. Halliday.

PETER CAMERON, sergeant river police, deposed to the facts of the case.

*Cross-examined.*—Had had cases of prosecution in which the yellow fins were concerned, but as far as he recollected they were

classed with the smolts. Did not know that it was the practice of this district to take these fish as not being fish of the salmon kind.

A discussion took place here as to whether Mr. Macdonald should ask the witness as to the opinion of the district. The Sheriff decided that he would hear the surrounding circumstances.

The witness was recalled and said that he always "jaoused" that the yellow fins were of the salmon kind, and he had heard fishers say that they were so. He did not recollect any who had said so. Those who had spoken to him on the subject mostly were of his mind.

JOSEPH NAPIER, Superintendent of the Salmon Fisheries, deponed to receiving these fish. He had never heard the term "yellow fin" till he came to this district, although the fish was familiar to him as a smolt of the salmon kind. He had had some experience with regard to these fish. The difference between them and the ordinary salmon smolt was that their pectoral fin was dark and the tail more indented than those of the smolt pure. These sea trout smolts generally commenced to go down to the sea in the smolt stage, about the middle of April, and they were generally all down about the month of May. He had found them in the tidal waters at Kincardine, upwards of 20 miles below Stirling. When they went down to the sea they had a silvery appearance, and if taken up into the hand, however tenderly, some of the scales would come off and adhere to the hand. He had prosecutions at Alloa and Stirling for killing these yellow fins. Witness proved a conviction against defender dated 16th May, 1871, for having killed a salmon smolt.

*Cross-examined.*—He had been nearly five years superintendent on these waters. Before he came here he did not know the yellow fins as a class; they were just grouped as salmon smolts. The smolts were just the same as the six produced. He did not find when he came here that these fish were popularly looked upon as salmon smolts; it was only two years ago that any agitation had been got up about them. It was the fishers who first objected, for the cases of taking these fish, when reported, were always prosecuted. The first case was that of Spalding, 12 months ago. It was not a fact to his knowledge that during the five years before that fishers who returned smolts to the water kept these yellow fins as not being fish of the salmon kind. He just gave general instructions to his men as to the taking of smolts, and did not specify these yellow fins, and it was a little more than a year ago when he began to observe the distinction.

Mr. MACDONALD.—Did not the agitation get up in consequence of your instituting prosecutions for catching these yellow fins?

WITNESS.—Previous to that there had been a prosecution for taking the same fish from the Devon.

Mr. MACDONALD.—Not that; I am speaking of this district.

WITNESS.—There were only two cases in this district.

Mr. MACDONALD.—Therefore, the agitation got up when these two cases were got up.

WITNESS.—Yes.

Mr. MACDONALD.—And, therefore, the agitation was the result of the prosecution.

WITNESS.—Certainly not; quite the reverse.

Mr. MACDONALD.—The agitation followed the prosecution?

WITNESS.—Yes.

Mr. MACDONALD.—Therefore the agitation was the result of the prosecution.

WITNESS.—No, it was not.

*Cross-examination resumed.*—In Mr. Renton's case a year ago he was charged with having two yellow fins, and one parr or salmon smolt. He pleaded guilty to having the smolt, and the plea was accepted. The question of yellow fins did not then come up. Salmon smolts were now all down to the sea, but there might be some left yet. It was their usual habit to go down just before this time; it was possible that they might get a stray one.

Mr. MACDONALD.—That would be a strange fish. (Laughter.)

WITNESS.—As a class the smolt season was ended; and there were not plenty of yellow fins in the river that he was aware of. He had sent a man to fish the Allan on Monday, and he caught a number of common river trout and a beautiful sea trout, but no yellow fins, but it would not surprise him to hear that there were yellow fins in the river. The greater bulk of the yellow fins, however, were out of the river. He did not know that if he was wrong in his opinions, many other matters would go with it. These yellow fins had a red tip to the dead or adipose fin, but the fin was not the same as that of the common trout. The adipose fin of the yellow fin was of a darkish colour, but he could not say whether it was blue, or green, or red. He had examined all the fish libelled. He could not tell what was the colour of the fin; only it was darkish.

*Re-examined.*—There were great variations in the colour of fins, greatly owing to the water the fish were in and their feeding grounds.

Mr. MACDONALD.—And some would have a dark fin, and some a black fin, and some a red fin. (Laughter.)

JOHN BRISBANE, salmon fisher, residing in Bannockburn, deponed that he always considered the yellow fin a young smolt, but he had never looked particularly at the fish. He had during his 17 years' experience found these fish down in the river Forth as far as Alloa, Dunmore, Airth, and generally in the tidal waters—places where he had never taken the common river trout.

*Cross-examined.*—He never paid any particular attention to the marks, which were said to be different in the yellow fin from the smolt: he never had one five minutes in his hand, for they just returned them as quick as possible into the water when they took them with the net because they were so small. These yellow fins produced were larger than salmon smolts—they were sea trout smolts, but he could not say why the sea trout smolt was larger than the salmon smolt. He had never examined into the matter particularly, and only spoke of a general impression from the fish being along with the true smolt.

JOHN HALLIDAY, Bridge of Allan, an angler, deponed that he knew the Teith and Allan well. Had examined the six fish produced, and he considered them to be sea trout smolts. He had formed the opinion, because he found that they went to sea—he had got them in salt water. They were different from the common river trout in form and appearance.

*Cross-examined.*—A keen fisher would easily know a yellow fin. He had no doubt, but that he had put yellow fins into his basket long ago, not supposing them to be fish of salmon kind, but he did not think much about fish in those days. Some seven or eight years ago he formed the impression that the fish known in the district of the Allan as the "yellow fin" was a migratory fish, but in 1832, '33, and '35, he had caught them in salt water. He had once been consulted latterly by the authorities with the view to prosecution under the Salmon Acts. He could not say that his information on the subject of these fish was perfect. We were always gaining information. He could not speak as to whether the public in the Allan District considered these yellow fins as fish of the salmon kind,—"public" was a very wide word. He knew people who had the same opinion as himself, and he suspected that there were others who did not agree with him. He suspected a great many, but among the former were Mr. Robert Greenhorn and Mr. J. D. Brand. He obtained the opinions of these

gentlemen because he had heard them disputing with others. For himself he held that there was no dispute about the matter ; he was perfectly satisfied, but these gentlemen were disputing with others who were not perfectly satisfied.

DONALD MACDONALD, keeper of Doune Castle, an angler, deponed he had fished the Teith at Doune Castle for a number of years, and that he knew all the fish of the salmon kind which frequented the river. The first shown him were yellow fins or young sea trout. He knew them by their make and colour.

*Cross-examined.*—He did not think that there could be any difference of opinion as to their being young sea trout.

Mr. MACDONALD.—What are the points of difference between a yellow fin and a river trout ?

WITNESS said he could not mention the points of difference, but these fish are young sea trout.

Mr. MACDONALD.—Surely you can tell us the mark of difference between a gooseberry bush and a cabbage ?

WITNESS.—Just the same difference as between a calf and a lamb—a butcher would know which was which. (Laughter.)

*Cross-examination resumed.*—The yellow fins were a distinct species from the common trout, They were the parr of the sea trout. (A number of fish were shown to witness.) Two of them (Nos. 1 and 2) are parr. No. 3 is a young sea trout ; the remainder are yellow or common trout. There was a difference in the age between these parrs and the sea trout. He could not say whether they were of the same age—sometimes smolts remained in the river for two or three years. He distinguished a smolt from a river trout when they got on the silvery coat to go down to the sea. The smolts of sea trout and salmon were not all the same size, but generally speaking they were about a size, generally. The adipose fin of the yellow fin had generally a dark appearance—he could not say that it had much colour, but it was a darkish colour. He could not say that he had even looked at it through the light. The colour of the dead fin was the same in the common trout. Besides their silvery appearance the spots were a mark of distinction between the common trout and the yellow fin—but the shapes of both were pretty much about it.

Mr. MACDONALD.—What do you see about these six fish libelled to distinguish them ?

WITNESS.—I see that they are sea trout. (Laughter.)

Mr. MACDONALD.—That is all that you can say ?

WITNESS.—Yes ; that's all.

Mr. MACDONALD.—Then you go only upon a general impression of the fish of the Allan.

WITNESS.—I cannot speak about the Allan. I can speak about the Teith.

Mr. MACDONALD.—The Teith is a dark flowing river, is it not?

WITNESS.—In some parts.

Mr. MACDONALD.—Generally speaking, as it passes Doune?

WITNESS.—In some parts it is.

Mr. MACDONALD.—But the bottom is dark, although the water is clear, and that is what gives the dark colour to the water.

WITNESS.—Maybe; sometimes it is darker than at others.

ROBERT TEMPLE, water-bailiff, Tweedmouth, for 38 years, deponed that he had seen these six fish libelled in the custody of the sheriff-clerk at Dunblane, and he pronounced them fish of the salmon kind. He had seen that fish on the Tweed. They were looked upon as salmon smolts, and were never known as anything else. On the Tweed parties had been prosecuted for killing such fish as young sea trout. He assisted Mr. Smith of Ancroft in marking, by means of a piece of wire inserted in the gill cover, several of these fish, and put them in the river again. One of them he caught a year afterwards as a whitling or sea trout at a point in the Tweed about two miles above Berwick. Bailiff David Percy, who was a man of great knowledge and experience in these matters, also marked orange fins with the same result. He knew that these orange fins or yellow fins migrated to the sea, and he never knew of them coming back in the same stage as that in which they went away—he had never seen them coming back as orange fins. He had also assisted Mr. Paxton to mark orange fins in the tail, by putting in a piece of wire and then twisting it, and he knew of these wires having been taken out of the same fish as whitling. He had marked some in 1844 for Mr. Mitchell of Springdow, and one of these was taken at Yarrow as a whitling in 1845. They were still experimenting on the Tweed with regard to these fish.

*Cross-examined.*—Mr. Paxton marked salmon smolts as well as orange fins. The nature of orange fin had not been in dispute on the Tweed for a great number of years; not at least after the experiments began. Experiments were made in the district to prove that the orange fin was the young of the sea trout, and everybody came to know that who was practically acquainted with the river, and nobody, after the prosecutions which were instituted thereon, maintained that they were not.

Mr. MACDONALD.—Have you ever heard it made a ground of defence that they were not the young of the sea trout?

WITNESS.—Oh yes; that's what lawyers are for—the same as yourself.

*Re-examined.*—All that he could say was that a particular fish was caught as whitling which had been marked the previous year as an orange fin.

GEORGE YOUNG, residing in Berwick, a lessee of fishing on the Tweed, and one of the river commissioners, deponed that he had been intimately acquainted with all fish of the salmon kind since 1842. They had a fish on the Tweed known as the orange fin. He had seen the six fish produced, and had formed the opinion that they were the yellow fin of the Allan, the same as the orange fin of the Tweed, and that they were the parr or young of the sea trout. Very extensive experiments had been made in the river with regard to these fish. He was a Tweed commissioner, and also belonged to the experimental committee. They had marked these fish for a great number of years, and had traced them into all stages of their growth from the egg to the full grown bull or sea trout. The result of these experiments was that the orange fin was found to be the young of the sea trout. Prosecutions had taken place for killing orange fins frequently, and there were a great number of convictions.

*Cross-examined.*—The Tweed Commissioners conducted their experiments before the passing of the Salmon Act, in order to settle satisfactorily what kinds of fish were fish of the salmon kind, and to enable the committee and the public to see that these orange fins were fish of the salmon kind, and that they therefore came under the Salmon Acts. These were both male and female orange fins, and they were found in much the same proportion as among smolts or parr. They were known as "blacktails" just before passing from the orange fin into the whitling or bull trout. As blacktails they were very beautiful fish, averaging from 15 in. to 16 in., and weighing from 1½ lbs. to 1¾ lbs. The committee had marked these fish so carefully that they could not have any doubt about the fish.

*Re-examined.*—They never came back in any other shape than that of sea trout. They did not come back into the river as yellow trout, nor as any other trout except sea trout.

ROBERT BROWN, drawing master, Perth, deponed—I have for a long period studied the natural history of salmon, and written several works on the subject. I have watched experiments, and have made them myself. The six yellow fins produced belong to

the migratory species. I think the most of them are grey trout. I have tried hatching experiments. The progress of the development of sea trout is the same as salmon. Those hatched in April go to the sea next April. They could not go to sea without the migratory dress. Some go in a year to sea, but some remain in the river for three years. The young male of the sea trout and of the salmon trout propagate their species long before the female, I have marked young sea trout and got them back as whitlings. In Perth, not one person in a hundred would know the term "yellow fin." To the best of my belief it is a sea trout.

*Cross-examined.*—No one could give a decided opinion upon the six fish produced. He would not like to do it. The term "yellow fin" was not properly understood in many places, but he had heard the expression "orange fin" throughout the whole country, but they meant the same fish. The knowledge of scientific men was still vague upon these fish. He did not think that scientific men had taken the proper means of settling the matter; at least he had never heard of their doing it. It might be that the term "orange fin" was used in Acts of Parliament, but the name was not known as a general thing.

Mr. MACDONALD.—Suppose that you wanted to have it finally settled whether these fish known as "yellow fins" caught in the Allan, were or not fish of the salmon kind, what would you do?

WITNESS.—I can't say. I don't frame Acts of Parliament.

Mr. MACDONALD.—Well, but suppose you wanted to settle it?

WITNESS.—The best thing would be to mark the fish.

Mr. MACDONALD.—Do yellow trout go down to the sea at the same time as parr?

WITNESS.—Parr do not go down to the sea at all. Parr won't live in salt water. The sea trout smolt went down to the sea at the same time as the salmon smolt. That fish (produced) which he called the bull trout went down sooner, perhaps a fortnight or three weeks, than the salmon smolts, and they came up sooner, and created great mischief upon the spawning beds. They were both male and female, and were very destructive to salmon ova; in fact, if they could be got rid of it would be a great benefit to the fisheries of the country. (Laughter.) The body of a bull trout was  $4\frac{1}{2}$  times the length of the head, that of *salmo trutta* five times; the latter being a very handsome fish. Bull trout were very different things from sea trout; the gills of the former being always full of maggots, even when in a healthy state. The bull trout and the yellow trout were quite distinct species, and wherever fish like the six produced



were found, they might expect to see bull trout of a more developed size.

Dr. ALBERT LOUIS CHARLES GÜNTHER, M.A., M.D., F.R.S., &c., deposed—I occupy a position in the zoological department of the British Museum in London, and have now been occupied with it for about fifteen years. My attention has been specially directed to the ichthyological department, and I have directed a great deal of attention to the family of *salmo*. I may say that I have examined hundreds and thousands of specimens. I know the different kinds of salmon common in the Scotch rivers personally. I have examined a good many of them. I have published a work on this department, which forms part of a general work upon ichthyology, with explanatory descriptions. I have found that the kinds of *salmo* which visit the Scotch rivers are the true salmon, or *salmo salar*; the ordinary river trout which does not go down to the sea, *salmo fario*; a number of varieties of sea trout which might be conveniently comprised under *salmo trutta*. Some of these have been distinguished into distinct varieties, such as *salmo eriox*; and I have distinguished *salmo brachypoma*, which I believe to be the same as the orange fin. These six fish (libelled) are the young of one of the sea-going migratory trout. There can be no doubt about five of them; this odd specimen which I marked, I had some doubt about, and have not examined yet. The others are the young, between one and two years old, of sea-going *trutta*, that is to say *trutta* which annually go down to the sea, returning periodically into the rivers to spawn. As to this odd specimen it does not seem to have had the same parentage as the others. There is a distinction between the young of *salmo salar* and a number of the *farios*. In the parr of the former I have counted as many as nine or ten cross bars, and in the latter only six or seven. In the second year or smolt stage, one of the most important points is the change of colour. A fish which remains long in the river like *salmo fario*—a non-migratory trout—does not change its colour, but all migratory fish when passing into the smolt state assume a silvery colour, which gradually overlays the parr marks, when they disappear. Now and then you may remove these silvery scales and find the parr marks underneath, but in time these disappear, and the whole fish assumes a silvery hue, retaining only a certain number of black spots. This is never found in *salmo fario* living in the running stream. I do not know of one single instance in which *salmo fario*, living in the running streams, assumed the silvery appearance. The difference in form of the fishes is another characteristic,

*Salmo fario* is deeper in the body than the other *salmonidæ*. Then another important matter is the form of the caudal fin. In *salmo fario*, which requires a special kind of caudal fin for locomotion in running water, it is different from the same fin in *trutta*, which are fish which go down to the sea to comparatively still water. Those fish living in the river require a much stronger caudal fin, and you find that in *salmo fario* the caudal fin is wholly of strong rays, and the lobes become more obtuse and rounded—and it is in fact a short, strong paddle. When these fish go down to the sea nature provides them with a different organ of locomotion. The fins become lengthened in the lobes and the sides, the rays become more delicate, and the membrane is more dark; it is, in fact, the organ which is best adapted to propel a fish through still water. Every fisherman knows that this fin in *salmo fario* is more truncate and in the smolt and the grilse it is more deeply excised. Another important distinction is the number of pyloric appendages. The highest number in *salmo fario* I have found to be 46. These pyloric appendages are found running along the narrower part of the intestines, and they are blind—that is to say, they are open at one end only. What they are used for we do not know exactly, but there they are. Well, in *salmo fario* we find the number is much less than in those fish which go down to the sea. Then in the sea trout there were, on the average, considerably less than there are in the most highly developed *salmonidæ*. So you find on the average in *salmo fario* from 35 to 37; in *salmo trutta* 47, and an average of 50 and 52; in *salmo salar* you have as many as 60. Now, with regard to these numbers they approach each other closely, but we can only say that in *salmo fario* we never find so high a number as in *salmo trutta*, and you never find so low a number in *salmo trutta* as in *salmo fario*. The highest number I ever found in *salmo fario* was 46, and the lowest number in *salmo trutta* 47. I do not recollect at present of one single instance in which they overlapped. As to the teeth along the middle line of the palate, there are two rows of teeth in *salmo fario*; in *salmo salar* there is only one line, and in *salmo trutta* two lines, but these are placed zig-zag—the teeth in the one row being exactly opposite the space between the teeth of the other row. This is found by removing the mucous membrane on the roof of the mouth, and exposing the seats of the teeth on the bone. Outside the membrane the teeth appear twisted and turned aside in a very irregular manner, and you must remove the skin in order to see the place of insertion in each teeth. The maxillary bone in *salmo fario* is much stronger than in *salmo trutta*.

I have received several specimens of the orange fin of the Tweed ; they were all *salmo trutta*. There might be roe or milt in them, but it would be in the most rudimentary condition, as you would expect to find them in any *salmo trutta*. I am not quite sure but that milt and ova might be found in a hybrid ; it has been found in parrs, and my theory is that where this is so, the fish is the product of a hen salmon and a male river trout—as it was frequently found that a hen salmon was spawning on the same gravel bed with a male river trout. This hybrid would come to maturity sooner than a pure bred salmon, and thus give the appearance of roe or milt being found in the parr. As to the size of the fish, some fishes come to maturity sooner than others, and I cannot account for the smolt of the sea trout going down to the sea larger than that of the salmon proper—that is to say, if the sea trout is absolutely the largest of the two.

*Cross-examined*—I do not know of a single investigation in the whole field over which I have now travelled which may be considered incomplete. What I have stated in reference to *salmonidæ* is well ascertained. I have heard the term "yellow fin," but I am not sure that it is well known. The term "orange fin" may be so common that it got into Acts of Parliament. External appearance is one of the most important points for identifying the *genus*. Absolutely taken by itself it is always trustworthy, but not to be absolutely relied upon. Old specimens of the *salmo fario* go down to the tidal waters. I could not say that they go down to the sea. They go down into the tidal waters of the Thames. They have been caught there where the water is perfectly salt, but these are rare instances. One of the six fish produced may be a hybrid, but not being in a very good condition I am not able to judge of it now. In it the bars are more distinct. (Specimens shown.) These are sea going *salmo*. I have received a specimen of orange fins from the Tweed, which had been marked with silver wire in the lower jaw, which were got in the season following, and it was a sea trout. This specimen was sent to me by Mr. Smith, Ancroft. As yellow fins and smolts there is less definition of the differences of the external appearance than when a year or two older. I can only commence to tell the difference between male and female *salmo trutta* when the jaws of the male begin to be lengthened, but I am not able to see any difference from mere appearance or colour. A female fish full of roe may be deeper than a male in the body, but then sometimes you get a male fish so fat that it looks like a female. There no generic distinction between a bull trout and a sea trout. A

bull trout on the Allan is a different fish from a bull trout on the Tay, and again what is called a bull trout in Inverness-shire is again a different fish. I do not think that the term "bull trout" is only locally applied, but that every individual has got his own ideas of what a bull trout is. It would be quite erroneous to say that a bull trout was a different genus from a sea trout, for I should say that I think it highly probable that there are several well marked sea going sea trout to which you might apply the name bull trout. Yesterday in examining several of these orange fins I marked a number. In one I found 47 pyloric appendages, in two 49, in one 46,—they ranged between 46 and 49. The one with the 46 is now what I call *salmo brachypoma*. I have found as many as 46 in a *salmo fario*, but I do not know whether or not this latter was really a true bred *salmo fario*. These fish have not always got the testimony of their birth or of their parentage.

Mr. MACDONALD.—I suppose that applies as much to the unfortunate fisher as to the scientific man.

WITNESS.—No, it does not, because the poor fisherman has certain apparent characteristics by which he can be guided.

Mr. MACDONALD.—But if they are not sufficient for science, they are not sufficient for him?

WITNESS.—I do not know that the requirements of science are more strict than those of practical life.

*Cross-examination continued.*—The character of a hybrid is always of extreme variability in all kinds. In a cross between two animals, you will always find that scarcely two individuals are exactly alike—there is great variability of character. It is only in a fish or animal that is true bred that you find a certain consistency. When these orange fins return from the sea, in all likelihood in the month of August, I think some of the males may be fully matured to propagate their species; the females are always more behind, I do not speak of all the females, but they would all be ready to spawn in the season following?

Mr. MACDONALD.—Would you expect that these fish would be seen on the spawning beds this season or the season following.

WITNESS.—I do not like to commit myself to state anything. I know little about the actual history of these fish, or that they would have been ready to spawn, or have so come to maturity as to be seen upon the spawning beds on the first season after they return from the sea, but, judging from analogy, I should say that the majority would be seen after two years.

Mr. MACDONALD.—How do you know that a yellow fin is ready for the sea?

WITNESS.—When we know that a fish has put on a particular dress that fits it for the sea, we know it is ready for the sea, just as much as we are aware that a bird is ready for flying that has its wings fully developed. (A laugh.) I cannot speak as to their going only to tidal water where there is not much current. I cannot say positively that these fish go right to the salt water and live there until their return in the autumn. Local fishermen could speak more positively on this point. (Shown fish spoken to by witness D. Macdonald—Nos. 1, 2, 3). I state that the smaller one No. 2 is a parr, or young salmon. The third is a young *salmo trutta*. After dissection, the first is a hybrid, between a *salmo trutta* and a *salmo fario*. As to the *salmo trutta brachypomas*, I have only examined the skins of several large and fully grown specimens which had been collected by Mr. Parnel, and partly in the Forth, and it is only now that I have had the opportunity of examining one of the specimens among these yellow fins. This one had 46 pyloric appendages.

Mr. MACDONALD,—Then you have at last found a *trutta* which overlaps a *fario*?

WITNESS.—The matter stands thus. *Fario* runs from 30 to 40, *trutta* from 50, or thereabouts, to 60, and *brachypoma* is the medium and comes in between, from 46 to 49 is about the medium.

Mr. MACDONALD.—That is a very new and interesting point, Doctor. You have learned something new by this examination, and there is no saying what may come out of it yet. (Laughter.)

*Re-examined.*—I have not the least doubt but that these are migratory fish of the salmon kind. If I saw a fish taken from a river in a sea-going dress, I would at once say it was a migratory fish. Hybrids with a sea-going dress in rivers go to sea and are migratory fish. I state distinctly that *salmo fario* living in running water never assumes the silvery dress. It is a different thing with *salmo fario* living in lochs which have no current. I have never seen a hybrid which was exactly intermediate. They all lean more or less to one or other of the parents. Before going to sea, *salmo trutta* are extremely like *salmo fario*—before they assume their sea-going dress, and at that period it would be difficult to determine their affinity or relationship to sea trout. I never heard of a *fario* of the same size as those labelled going down to the sea. In *fario* and certain of the hybrids, the spots are ocellated—are black, with a light ring round each; this is not so in *salmo trutta*. A

practical angler should have no difficulty in putting the fish now libelled into the water again as sea-going fish.

Mr. MACDONALD.—That is to say if he knew all that you knew?

WITNESS.—Well, then he should know. (Laughter.)

Mr. MACDONALD.—And if he does not know all you know?

WITNESS.—Then he should learn. (Laughter.)

Mr. MACDONALD.—Would you punish a boy for not knowing what he ought to know when he could not learn?

WITNESS.—After I had told him twice. Many people are convinced of the fact, and still do not like to acknowledge it. I know that at the Coquet the Duke of Northumberland is exterminating bull trout in order to give more room and more safty for salmon. I think that the Duke is making a great mistake to destroy what he has for what he will never have.

Mr. MACDONALD.—Then you think that he ought to know better!

WITNESS.—Yes.

Mr. MACDONALD.—Are you aware that he is advised to do what he is doing by scientific men of great eminence?

WITNESS.—I am aware that he is advised by men of eminence,—but men of great scientific eminence, I am not aware. In fact, I think it is rather a mistake.

Mr. MACDONALD.—And they ought to learn.

WITNESS.—They will learn by experience.

Sheriff Grahame complimented the witness for the clear and concise manner in which he had given his evidence.

DAVID BRUCE, Stirling, a member of the Stirling Fishing Club, deposed, he had been a practical angler for a number of years. He believed from inference that the yellow fin was the young of sea trout, but he could not state so positively, as he had never made any experiments. They have the parr to account for the young of the salmon, the small yellow trout to account for the young of the yellow trout, and it seemed to him that the yellow fin could be nothing else than the young of the sea trout. The yellow trout was much more distinctly marked on the fins than the yellow trout. In April they had less distinction in their general appearance from the yellow trout, but in the month of May the distinction becomes more easily seen. He had no doubt about their being migratory fish.

*Cross-examined.*—About two or three years ago he turned his attention to this subject, but he had never given it much thought. In the beginning of April there really were a number of specimens of both yellow trout and yellow fin that could not be told the one from

the other in outward appearance, and it would be necessary to make an anatomical observation to discover their true nature.

MR. MACDONALD.—And to put them back into the river again to live after that, would be out of the question.

WITNESS.—I think so. There had been a great deal of dispute about the nature of the fish since this came up, but he had not heard much about it.

*Re-examined.*—As a practical angler he had put back these fish when he caught them during the last three years.

MR. MACDONALD.—And as a practical angler you kept them out before that. (Laughter.)

WITNESS.—Of course.

### WEDNESDAY, 5TH JUNE.

The case was resumed this morning before Mr. Sheriff Grahame. Mr. J. W. Barty, solicitor, appeared for the Fishery Board, and Mr. J. H. A. Macdonald, advocate, for the defendant.

Professor JOHN YOUNG, Natural History Department, Glasgow University, deposed—I have had occasion to consider the genus *salmo*. I have seen specimens of the yellow fin of the Allan, and also the fish libelled, and formed the opinion that they were migratory fish of the salmon kind, and that in fact they were the young of the sea trout. I thought so for the following reasons—from its migratory dress, and the anatomical points into which I went, which were the number of the pyloric appendages, and scales in different parts of the body, the general tint of the body, and the character of vomerine teeth. The yellow fin is generally more slender in the make of the bones, and the rays of the caudal fin are not so strong as in the river trout. These silver scales do not appear in any but sea going fish. The number of scales in the yellow fin taken on an oblique line from the adipose fin is greater than in the salmon and less than in the common trout. The proportion of scales in the yellow fin is 14 and in the river trout 15, 16, and even 17. The shape of the operculum also differed. The position of the dorsal fin also showed a difference. He had not found milt or roe in yellow fin. *Salmo fario* of same size as those yellow fins libelled would have the sexual organs developed. The pyloric appendages in the river trout was 33 up to 45, and generally 35 and 36 as an average; sea trout from 47 or 48, and the numbers found in a yellow from the Allan, 59. The vomerine teeth of the yellow fin are in a single row, as con-

trasting with a double row in the common yellow trout. In the river trout they are placed in the double series, but in the migratory fish they are placed in a single row, and the points of the teeth diverge so as to make them appear alternate. As the sea trout grows older they become lost by age, with the exception of one in the vomer. They disappear from behind forward. All the yellow fin of this size I have seen, were all in a more immature state than trout of this size. A practical angler should have no difficulty in determining the genus of the yellow fin, when he takes it out of the water fresh.

*Cross-examined.*—I have had occasion for some years past to examine these fish for class teaching. I got no fixed data from books before as to the yellow fin of the Allan, and to me it was a new field of inquiry. I have discovered nothing different in the yellow fin of the Allan from the similar fish in other rivers. I found it necessary to make these anatomical researches to make sure of the character of the fish. I have not seen the pyloric appendages number less than 50. The limit of number of the *salmo fario* are usually put from 33 to 44 and 45. As to the vertebræ, the number in the common trout is not a distinctive feature, it is 59 in each. The first ray of dorsal fin in the yellow fin is connected with the 16th or 17th vertebra, and in the yellow trout, as far back as the 20th or 21st. The difference in the number of scales is a comparatively recent discovery. In the yellow trout you feel the points of vomerine teeth more distinctly, and on the yellow fin they are slightly deflected, and many points will not be felt. The number of teeth was about the same on each, and advanced science is now showing that there is only roe in all the salmon kind. The differences of the measurements of operculum are only of relative value. The head of the sea trout is about  $\frac{1}{4}$ th of the whole length; in the yellow fin it is less, and in the *salmo fario* it is somewhat smaller. The sexual organs of the yellow fin from the Allan were not developed, and they appeared to him to be of no sex at all. They will never again, after producing ova, return to the state of the yellow fin. If a fish of any kind was found in the river Allan with roe or milt in it, I would not say it was a young sea trout. The red tips on the dead fin is a common salmoidic character. There are cases in brackish water at mouths of rivers, where the river trout takes on the silver coat, but I have never met with any. The silver scale is an evidence of their going not merely to the tidal water, but to the sea proper. As to the orange fin of the Tweed it had been traced to the sea proper, but this had not been done as regarded the Forth or the Allan. All the fish



libelled are sea trout in the migratory stage. The yellow fin is not the *brachypoma*; it was the genuine *salmo trutta*. The distinction between bull trout and sea trout is only a local and not a zoological distinction. I have not ascertained whether there are two kinds of the trout in the Allan—as the bull trout and the sea trout. The remark is made regarding the Tweed that the bull trout is destructive of young salmon, but he had no experience in the matter. He did not think it a mistake on the part of the Duke of Northumberland to extirpate the bull trout out of his fisheries. He had seen several hybrid fish from the Allan, but they were a small proportion of those he had examined. They appeared to be hybrids of sea trout and yellow trout, but he had no special interest in the matter. It was only of late years that these nice questions had been begun to be inquired into, on account of their economic value. Their importance was only for the preservation of the species for economic purposes. The “orange fin” of the Tweed, it has been ascertained, goes down to the sea and returns. He was not aware that any of the fish of the Allan called “yellow fins” had been traced to the sea.

Mr. MACDONALD.—Do you know the book by Mr. Russel of the *Scotsman* on fish?—I have not read it.

Mr. Macdonald then read the following extract:—

Beyond that, in the question about “fish of the salmon kind,”—*Salmo ferox*, *Salmo trutta*, *Salmo albus*, &c., &c.,—lies a vast field almost pathless, and thickly covered with an underwood of doubt and confusion. There are, perhaps, half a dozen species or varieties, all of more or less different habits, and almost all having different names in different localities, besides which the same name is often applied to different species; and the young and the adult of one species are sometimes classed as two species, sometimes *vice versa*. The facts, in short, are in darkness and confusion, and their confusion is twice confounded by a wretched nomenclature.” (Laughter.) Is that a fair representation of the state of information on the subject?—Scarcely.

If that is correct, it must be as regards the practical angler, and not as regards scientific men, I suppose?—I should imagine it would be as regards the person who seldom fishes.

The person who wrote this?—No.

This book is written by a well-known angler.

Dr. YOUNG.—There has been a good deal done since 1864.

Mr. MACDONALD.—During the eight years since then, there has been a good deal of information obtained?—Yes. That information was in existence before that amongst practical anglers.

Mr. Russel is a specimen of a practical angler who thought this a region of doubt and confusion?—Yes.

And since then there was doubt that a great deal of the confusion had disappeared, you think?—Yes; and fixed views are now becoming more fixed.

Is Mr. Russel's work a scientific authority?—I have heard it referred to more as regards legislation than scientific zoology.

*Re-examined.*—I have seen the orange fin of the Tweed, and from external appearance I think them the same fish. In the first year the characteristics of the young of salmon, sea trout, and yellow trout are not very marked. Young *brachyptoma* may have yellow fins, and have gone under the name of "yellow fins." Never heard of *ferox* being found above the tidal waters, with the sea going dress, and in point of fact they never go down below to the salt water without it. There was a possibility of hybrids of the sea and common trout showing earlier sexual development than the pure young sea trout. The maxillary bone was stronger in the young yellow trout, as were all the rest of the bones.

*Re-examined.*—I have never found a *ferox* with a sea going dress, and this was commonly understood to be so among ichthyologists.

*By the Court.*—The scale of the Lochleven trout was not so bright in its plumage. The coloration of the sea going fish was the result of their having to go to the sea, and not on account of the colour of the bottom or the nature of their feeding.

THOMAS TODD STODDART, advocate, residing in Kelso, a practical angler, author of several books on angling, deposed that he had fished in most of the rivers of Scotland. He resided on the Tweed for 36 years, and had had his attention constantly devoted to the subject of fishing. He knew the orange fin of the Teviot and the Nairn, and they are the same as the yellow fin of the Allan. He considered the fish libelled were the young of the sea trout. He found the orange fin in the months of May and June. The results of the experiments on the Tweed was that the orange fin were the young of the sea trout. In Nairn in 1830, he found migratory fish coming up with the tide, and half a mile from the mouth of the river, in the salt water, he had caught the orange fin in great numbers. In 1866 while marking some black tail at the mouth of the Tweed, he found along with others, among brackish water, a lot of orange fins in the bag of the net. This was in the tidal water. Mr. Shaw, of Drumlanrig, made similar experiments with the like results, and Mr. Wilson, another fisher, held the same opinion. It was acknowledged by every angler on the Tweed, that the orange fin was the young of

the sea trout, after the young of the *salmo* class. After it assumes the migratory dress, there should be, no doubt, in the angler's mind, for there was a black line along the edge of the caudal fin, and a greenish or olive spot at the back of the head. I never heard of the common trout assuming the migratory coat. In the young common trout the body is more compact, and it has a stranger look than the orange fin, and the scales of the latter were more tender than the others. He had seen the smolts of the sea trout larger than those of the salmon, because the trout were more voracious feeders. The propensity for going down to the sea was much greater in the young of salmon than in the sea trout.

*Cross-examined.*—The orange fins often stay very late in the rivers, still with the migratory coat, some putting it on earlier than others, and it has not yet been determined how long the silvery coat takes to grow. The process is going on during the time they are making their way to, and even afterwards they lost the colour of the fins as they go down to the sea. The *fario* has been found in the tidal waters, but they do not put on a silvery coat. Early in the season, the young of the sea trout caught in the tidal waters was not easily distinguished from the young of the yellow trout.

*By the Court.*—He could not distinguish between the young of the *salmo albus* and the *salmo ferox*.

By Mr. BARTY.—In 1836 the water bailiff at Nairn considered the orange fin the young of the sea trout. Bull trout have been got in Clyde above the fall. I believe they have been got through a drain from the Tweed.

Professor YOUNG recalled, and shown two fish, Nos. 7 and 8.—I think that No. 7 is a sexually developed sea trout with a small roe in it, and No. 8 a fish with 11 bars, is a salmon parr.

ROBERT HOGG, superintendent of the town's fishing at Stirling, for 18 years, deponed that in one year they killed 6500 ; second year 5777 ; in another 5596 ; in all that 4365 sea trout. That is within the last six years. They would average from 14d to 16d.

WILLIAM MATHIE, fisherman, at Blackgrange, deponed that two-thirds of the value of the fishings of the Teith were from the sea trout.

This finished the case for the complainant,

## DEFENDER'S EVIDENCE.

THOMAS PERCY, salmon fisher on the Tweed, remembered that he assisted at the marking of salmon smolt, the sea trout smolt, and the orange fin, with silver wire above the tail. Mr. Paxton and Mr. Lilly were the principals. This was 25 years ago. There was no distinctive feature in the marking. He had caught them during the first six months of several years in the Whiteadder, a few miles from Berwick. He had caught them in September with the silvery coating on them. There was no obstruction in the Tweed to prevent them going down to the river. He had been handling these salmon or sea trout smolts for 28 years, and never saw one after May; but after that he had seen orange fins plentiful, indeed. Every orange fin was marked with the wire above the tail. In the stomach of large yellow trout he had found both salmon and sea trout smolts, when they were in fresh water. He never found a fresh water trout with an orange fin in them. In his opinion, as a practical fisher, the orange fin was not the smolt of a sea trout, and not a fish that went down to the sea. He had also seen the common river trout in the tidal water. He never could catch a yellow fin with a yellow fin as a bait.

*Cross-examined.*—At the time he assisted at the experiment he had spoken of, he was fifteen years of age. He had heard of experiments since. Thomas Todd Stoddart was a good angler, but not the best angler in the district, and Mr. Thomas Smith, and Mr. George Young, Berwick, were members of the experimental committee, and he did not know till to-day that it was their opinion that the orange fin was the young of sea trout.

*Cross-examined.*—If the orange fin were marked and came back as a whitling, he would not believe it. He could not tell the use of the silver coat put on by parrs. The sea trout smolt is like the salmon smolt, but shorter with lighter fins. (Shown fish, Nos. 1 to 8.) They are all yellow fins. He had never read a book on angling, and did not know that a bit of a parr was one of the deadliest baits for the salmon, nor that bull trout roe was the best bait for the salmon. He never heard of the marked yellow fin smolts, except those he had heard of in Court on the previous day.

*Re-examined.*—His opinion was that the parr was not the young of salmon.

*By the Court.*—The parr was the young of salmon trout.

CHARLES CAMERON, living at Berwick, an angler of 30 years in river and sea, deponed, that he knew orange fin, and some called

them yellow fin. He had caught them at all times of the first season in the rivers, and he never saw one at the sea coast. He never found an orange fin in the net drawn from the sea. The orange fin was not a fish that went down to the sea, but only tidal. Their going down to the sea was still a matter of dispute, and no information had been given to the public in Berwick, that they went down to the sea. He had found salmon smolts in the bull trout. The salmon had another enemy at the mouth of the harbour, and that was the cod. (Laughter.)

MR. MACDONALD.—Oh, bother the cod. (Laughter.)

*Cross-examined.*—He was now a hawker, but he was for 30 years a salmon fisher. He had dragged dozens of yellow fins out with the net in the river, and with the same net he had never caught them in the Tweed. It was always his opinion that the yellow fin was the water trout. He had never heard of the experiments on the Tweed. He knew nothing of the history of the orange fin during the past 8 or 9 years since he left the fishing, but he believed that it was the same yet. (Laughter.) He never heard of the prosecutions for killing orange fins. He believed yellow fin to be yellow trout because they had yellow fins. He did not know anything about parr. He never knew that the first year of salmon fry was what was parr, and he never knew that salmon smolt had anything else than the silver coat. He had never seen the young of salmon before they were about an ounce in weight.

ALEXANDER MARTIN, 26, Millbank Street, Glasgow, caught a fish in Lochleven which he handed to Mr. Cameron : he gave it as a specimen.

DAVID CAMERON, residing in Dunblane, deposed that he got a fish from last witness, and handed it to Mr. Walsh. He caught five small fish in a burn running into Lochleven.

*Cross-examined.*—Identified No. 7 as the trout he got from last witness, and No. 8 as one he had caught in a burn at Lochleven. Identified 1 to 6 as yellow trout.

CHARLES FREDERICK WALSH, Southall, London, deposed, that he was correspondent of the *Field* at Perth at one time. He was an angler of old standing ; and considered the yellow fin as a yellow trout. All trout were so far migratory, and those in the river went down to the brackish water. He believed that *salmo fario* went down to the brackish water. He had caught silvery trout in running water where they could not possibly reach the sea. He was inclined to think that the yellow fin was a hybrid

between the *salmo salar* and *salmo trutta*. He had heard it stated on the Tweed that the yellow fins were the young of the bull trout. There were no bull trout in the Allan, and the yellow fins there could not be the young of the sea trout. The fish produced, Nos. 7 and 9, were Lochleven trout which he had procured from the last witness.

*Cross-examined.*—He had fished in Scotland, in the Tay and its tributaries. He had seen a great many eminent men bogle at the anatomical differences in the kinds of trout. No. 9 was a yellow trout, and No. 10 is more like a sea trout, but more spots on it than he would like to see. He did not know anything about the Tweed experiments.

*Re-examined.*—Fish have different habits in different rivers. He would not take the rule of one river to rule another. He thought yellow fin were hybrids, and according as they had a predisposition of sea-going propensities they would go to the sea.

WM. SNODGRASS, writer, Falkirk, deponed that he knew the fish called a yellow fin. He had caught it in the Allan this season, and had taken the same fish in the Ayrshire, Renfrewshire, and Lanarkshire rivers, at places where they could not possibly reach the sea. He had gutted these fish and never found one of them a male to his knowledge; and one he caught lately was a female. He thought the yellow fin to be a hybrid, and that they were in the river at all seasons of the year.

*Cross-examined.*—He did not know anything about the experiments on the Tweed as to these fish (shewn fish.) Nos. 1 to 10 were all fish he would put in his basket; he did not see any yellow fins amongst them.

MR. BARTY (handing up No. 10)—Open up the fish and tell us what it is.

WITNESS.—I'm not a fish doctor.

MR. BARTY.—But you are in the habit of opening up your own fish.

MR. MACDONALD.—But not in the habit of gutting yours; that's the difference.

ROBERT LEES, gunsmith, and fishing-tackle maker in Perth, deponed that he had paid a good deal of attention to fishing. He knew the fish called yellow fin, and he did not think they were migratory fish of the salmon kind. His principal reason was that the adipose fin was tipped with red, and this was never found in a migratory trout. In sea trout this fin was almost transparent. The smolt had a forked tail and the trout a square tail. The trout

of different rivers vary very much in their appearance. He caught similar fish with yellow fin in the way last week.

*Cross-examined.*—The young of the sea trout was the same as the young of the salmon. He judged of the yellow fin from their external appearance. He judged of the fish by the adipose fin being tipped with red, and he had seen and landed hundreds of parr from Stormontfield ponds, and these were not red tipped on the adipose fin. (Shown fish.) No. 1 to 10 they were all common trout.

ALEXANDER CROALL, Perth, superintendent of Tay Fisheries, Perth, deponed that he had seen the fish founded on in this case, and thought they were a species of trout, and they were not like smolts or salmon fry.

*Cross-examined.*—He never saw young sea trout to his knowledge.

JAMES HOOD, Stirling, lately a river watcher and a salmon fisher for nearly 35 years. He knew the yellow fin, and he considered them to be yellow trout, and he had seen them in the tidal water. He had also seen river trout there. Never got any instruction about sea going yellow fins, and anglers were allowed to take them.

*Cross-examined.*—Did not recollect of reporting cases of taking yellow fins; the cases as far as he recollected were for salmon smolts, and this was in 1870. The dead fin of the yellow fin was tipped red just as the yellow trout, and that was the reason why he did not think they were a sea-going fish.

DAVID BAYNE, builder, Dunblane, deponed that he had lived all his life in the neighbourhood of the Allan. The channel of the Allan was very shallow at the Mill of Keir. He had always been a keen fisher, and he knew the yellow fin, and it was yellow trout to his belief. He had examined a number of these yellow fins, and he found them to be chiefly females. He had found roe in them. There was great variety in the number and colour of the spots on the trout. The tip of the adipose fin of the yellow fin was red, and that was considered an infallible sign in the district of their belonging to the yellow trout class. He heard for the first time two years ago, when a little boy was pulled up for catching a yellow fin, that a yellow fin was the young of a sea trout. That took the whole fishing fraternity by surprise, with the exception of Mr. Halliday. He took an interest in fishing, and he never took smolts since he was a boy, but he never heard of any one hesitating to take a yellow fin except Mr. Halliday. They were regularly sold to fish-mongers and exhibited in shops.

*Cross-examined.*—This was two years ago. He would like to see the orange fin grow to be whitling before he would believe that they went to the sea. If the yellow fin was marked, and he knew that it went to sea, and grew to be a sea trout, he would be satisfied then. He judged yellow trout from the redness of the dead fin, and the spots. The same sort of signs were observed in the yellow fin. He did not know that there were any differences between the smolts of salmon and sea trout, except perhaps their size. As a practical angler, he could distinguish between the yellow fin and the yellow trout of Allan.

MONDAY, 10th June, 1872.

The hearing of evidence for the Defender was resumed this morning. Mr. Barty, solicitor, appeared for the Fishery Board, Board, and Mr. J. H. A. Macdonald for the respondent.

JOHN BAYNE, builder, Dunblane, deponed that he had been a fisher for nearly fifty years on the Allan, Teith, Devon, Earn, and various other streams. He knew the fish called yellow fins, and he had seen the fish libelled in this case. He had, generally, seen such fish in the river at all seasons—from March to June with the silvery coat on them. He had caught some in March this year in the Allan, and they had the silvery coat on when he caught them, but it was off when he got home. He had cut up dozens of yellow trout and several yellow fins; he found milt in the yellow trout and roe in the clear fish. The spots on the yellow trout and sea-coated fish always varied in number. The red tip on the dead fin of the yellow fin and yellow trout was an infallible mark as to its being a non-migratory fish. He thought, decidedly, that yellow fin was a female kelt yellow trout—they were fish that had spawned. He had never heard it doubted that the yellow fins were yellow trout till the case of Spalding a year ago. He never heard of any practical angler who thought yellow fin to be anything else than yellow trout. He had taken these fish for 50 years, and many others had done so also.

*Cross-examined.*—Went with Mr. Renton to Stirling and saw these fish libelled, and he then said that they were yellow fins. They were much clearer now than they were then. He did not think that the fish libelled were the young of the sea trout. They were now decomposed, but they were 10 times whiter now than when he saw them at Stirling. He had not found out what the young of the sea trout were, and he could not speak on the



anatomical differences of the trout species. He knew that the highest scientific authorities called the Lochleven trout the young of the sea trout and of the salmon. The yellow fins had a silvery coating on in March and April at the time the smolts had it on, but the yellow fins were now nearly all out of the water. He got a yellow fin at Bridge of Allan last Saturday, and he put it into a piece of paper to carry it home, but when he got it there the silvery coat came off by adhering to the paper. The silvery coat came off very easily. He did not think that the provision of nature as to the silver coat on the smolt was the same as that to the yellow fin. He heard it said that yellow fins went down to brackish water. He saw on Saturday a yellow trout that had been caught in brackish water at Montrose. He never found a male yellow fin. He was decidedly of opinion that the yellow fin had spawned in the end of the season, and the roe was in them again in April and May. He had no knowledge of the young of the sea trout—he had no theory at all on the subject; he went by facts. A smolt was a fish with clear fins and marked similar to parr and he still held the opinion that parr were not the young of the salmon. He did not know how many migratory fish of the salmon kind there were and he had heard of hybrid fish, but he was not aware that there were any in the Allan, or that the yellow fin was a hybrid.

*Re-examined.*—He had never heard of a hybrid till this case came up.

By the Court.—He was certain that the fish he had got from Montrose was a yellow trout. There were several white scales on it, but he was clear on the point that it was a yellow trout.

WM. SUMMERS, fishmonger, Bridge of Allan, deposed that he knew the yellow fin, and he had bought and sold them often in his trade by retail, and they were exhibited in his shop in the same way as any other fish. He had bought yellow fins from Mr. Halliday frequently, but not within the last year, and he had also bought them from other fishers. He had heard of the prosecution of Spalding last year, but up to that time he had never heard that yellow fins were fish of the salmon kind.

*Cross-examined.*—He had been in business at Bridge of Allan for twelve years, but he was not a practical angler. He could not give dates for the times when he bought from Mr. Halliday. He had ceased buying yellow fin since the case of Spalding.

JAMES GIBB, innkeeper, Dunblane, deposed that he had fished the rivers in this district for nearly 40 years, and had also

fished the Douglas water. Never heard of the name yellow fin up till two years ago, for the fish now known as the yellow fin was always considered a yellow trout. Among practical anglers the red tip on the dead fin was always considered a sign of a fish being yellow trout. He caught these yellow fins from March to May, and according as they advanced towards spawning, they took on a darker colour. He had cut up a great many yellow fins, and found roe in them all, but two. The roe was small, but mature, though not ready for spawning. He had observed the fish of the Allan, and he knew that there was great variety as to the scales and spots on the yellow trout.

*Cross-examined.*—It was from the general resemblance of the yellow fin that he thought it to be a yellow trout. He could not distinguish the young of the sea trout from the young of the salmon. He knew that the old sea trout had not a red tip to the dead fin, but he could not speak about the young. He knew that the smolts put on a silvery coat, and so did the yellow fin, but he did not know that they went down to the sea together. He had heard of yellow fins being got in the tidal water. Just now the yellow fins were found in the river, but they had not so much of the silvery coat. He did not think river parr to be either salmon or sea trout. They were different from the parr in the Stormont-field ponds. The tail of the yellow fin was different from that of the sea trout.

By the Court.—When the silver coat was off the yellow fin he could not distinguish between it and the yellow trout, and if they caught a yellow fin with the silvery coat and rubbed one side off, the yellow trout marks would be found underneath. At all seasons they would be found partially silvered.

JOHN STEWART, dentist, Perth, a practical fisher for 25 years, deposed that he considered the yellow fin to be a variety of the yellow trout. The dead fin was more yellow and the tail not of the same shape as in the sea trout. Scientific men differed on the point of the number of teeth in the vomer as a test of the kind of fish. He did not yet doubt the red tips as a sign of a yellow trout.

*Cross-examined.*—Had never fished the Allan, and did not know specially anything about the fish of the river. Had never made experiments with the young of the sea trout. He had never seen a young *brachypoma*, but he had heard that there were such fish. He did not make experiments as to the vomerine teeth, the pyloric appendages, or the maxillary bones, and could not speak on these points.

*Re-examined.*—The red tip on the dead fin of the yellow trout was much brighter than in the sea trout.

By the Court.—He did not know that there was such a fish as the yellow fin in the Tay—at least he had never seen any. On the Tay it was not considered that there was any perceivable difference between the sea trout smolt and the salmon smolt. He had seen hundreds of salmon smolts, taken by boys, but he never saw a sea trout smolt or one like the yellow fins. (Shown a fish.) That was a parr. He knew it by the bar marks and the slight silvery coat. He had no doubt about the parr being the young of the salmon. He had never any doubt about it.

JAMES KING, weaver. Dunblane, for 40 years an angler on the Allan, deponed that he had been a watcher for the Fishery Board and for the Dunblane Anglers' Association. The first time he heard of the name yellow fin was from a Dr. Monro, who made cigars at Bridge of Allan. At a certain time of the year the yellow fins were found in tributaries of the Allan, above the mill of Ardoch, where they could get down to the sea but could not get up again. He had never heard of a sea trout being taken above the mill of Ardoch, and never heard of one getting up. He had met Dr. Monro 15 years ago. In his (witness's) younger days the yellow fin was called the "clear yellow trout." The most of the yellow fins he had caught were females. His theory was that the female trout at the time of spawning was very dark, and after they had spawned it got whiter, and was then distinguishable from the males. Neither he nor any other body, he thought, could tell what the young of the sea trout was like. The young of the sea trout, salmon and grilse, were all parr, but in the parr state they were hardly distinguishable.

*Cross-Examined.*—He would be surprised to hear that there were salmon parr in the Loch of Orchil. He never heard that parr were put into that place 12 years ago. About three weeks ago he caught in the Knagg, a mile above the falls, two yellow fins with a clear silver ring round the neck, and when he was taking the hook out of their mouths the silvery gloss came off on his hands. Sometimes this ring was noticed on the yellow fins from the Allan. In April and May the yellow fins were caught rifer above the mill of Ardoch, and with more silver coating than in May and June. There were no salmon or sea trout above the mill of Ardoch.

By the Court.—Yellow fin could be caught all the year round in the Allan, and he had caught them below the Muckle Burn in the

harvest time with the silvery coat on them. Sea trout went up the Muckle Burn to spawn.

JOHN EADIE, lately a river watcher, deponed that he had seen the fish produced in this case, and he considered them to be yellow trout. He had cut up yellow fins and found them always to be females. He generally corroborated the last witness.

JOHN MORRISON, weaver, Dunblane, an angler, deponed that he had been for a long time with his father on the Teith, at the Mill of Torr. He had been a watcher under the Fishery Board, and he never had any instructions given him as to the yellow fin. He never heard it doubted that the fish of the kind libelled were yellow trout.

*Cross-examined.*—In April and May all trouts took on the silvery coat less or more.

ROBERT GUTHRIE, gas manager, Dunblane, deponed that he had observed the habits of fish found in the Allan, and he considered the yellow fin to be a species of yellow trout. He had seen them with the silvery coat from April to June, but in June there was less of it than at an earlier period of the year.

*Cross-examined.*—All he judged a common trout by was the red tip to the dead fin, and the yellow fin and the spots. He took the smolts of the sea trout, salmon and grilse, to be all the same in appearance. He had seen roe in the yellow fin at this time of the year in the same state and development as in the yellow trout.

GEORGE TODD, manufacturer, Mill of Keir, deponed that on the 24th April of this year he saw Cameron and Renton in conversation at the Mill of Keir. Cameron asked him to see his bag. Mr. Renton gave him it, and he turned up the trout in it and selected what he wanted. Mr. Renton just put the bag down on the ground, and told Cameron to take what he wanted. Witness looked into the bag and saw the fish in the centre of the bag. There was no division in the bag. Cameron selected the fish from among the other trout.

*Cross-examined.*—He did not see Tait examine the bag, and could not say what position the trout were in when he did so.

JOHN WALKER, wool-spinner, Mill of Keir, was present when Tait came up with Mr. Renton on the Allan on 24th April last. Tait asked him what take he had had, and Mr. Renton lifted the lid of his bag, and Tait looked in and then put his hand in. Witness looked into the bag and saw that the fish were all in the centre of the bag. The bag contained two pieces of pasteboard, running from side to side and sticking to the sides.

*Cross-examined.*—He did not see any fish in any other part of the bag. It had only one compartment.

*Re-examined.*—Witness stated that Cameron had roughly used him at the waterside, and he had lodged a charge of assault against him, but it was not taken up by the Fiscal.

ALEXANDER DEMPSTER, mill worker, Mill of Keir, deponed that he saw Tait and Renton at the Mill of Keir, and when Tait asked what take he had had, Mr. Renton showed him his bag. Walker was looking on at the time. He afterwards saw something that took place between Walker and Cameron, and he could tell all about it when wanted.

This closed the case for the defence.

Mr. BARTY, for the *Complainers* said that in this case both prosecutor and criminal did not differ as to the main facts upon which the complaint was based. They both agreed that upon the 24th April last Mr. Renton, the respondent, while fishing on the Allan with rod and line, caught certain fish. They also agreed that these fish were yellow fins, but they afterwards differed—the prosecutor held that these fish were migratory fish of the salmon kind; but on the other hand, Mr. Renton said that these yellow fins were common trout. His Lordship had had a three days' enquiry into the matter, and he (Mr. Barty) was sure that no member of the angling community of Dunblane could complain that full justice had not been done to the subject in dispute. Counsel for the respondent seemed to think that instead of prosecuting Mr. Renton upon this occasion, the Forth Fishery Board ought to have instituted a long series of experiments with regard to yellow fins—to know what they were in their different stages of development, by sending them marked to the sea, and getting them back into the river again. But the Forth Fishery Board were saved that trouble by a long series of most careful and satisfactory experiments made on the river Tweed. It was in evidence that the Tweed Commissioners, for a long series of years, marked the fish called "orange fin," which were clearly identified with the yellow fin of the Allan, and so satisfied were they that they were the young of the sea trout that they had ceased to experiment to the same degree with regard to these fish. The Forth Commissioners were satisfied with experiments made by the Tweed Commissioners. On the first view of the case he was not surprised that there should be a certain feeling of sympathy felt for the respondent and public in reference to this prosecution. He was not surprised to hear the public saying that it was an intolerable hardship that

the innocent recreation of angling should not be allowed to be carried on on the river Allan without running the danger of taking a forbidden fish, and which in external appearance was so like a fish that was not forbidden. *Ex facie*, that looked an ordinary view of the case on behalf of the public, but in reality there was no reason for it. They must look for the reasons which actuated the Forth Fishery Board in bringing down Dr. Gunther from London, Mr. Thomas Tod Stoddart from Kelso, and Dr. Young from Glasgow, to determine this case. Their reasons were that if there was the least doubt in regard to this it could be resolved by the merest tyro in fishing who chose to exercise his own eyesight. The doubt arose entirely from an obstinate local prejudice which was based upon no foundation at all. For instance if the parish of Dunblane were polled to-morrow, one half would be found saying that the world was round, and the other half the world was square. He did not know how such a prejudice was to be set aside but by the highest scientific evidence. It would not be sufficient to bring the one half of Dunblane to swear against the other half, but whatever board had the duty of prosecuting, it would require something more than local knowledge to determine the fact. So that with these published opinions, it would not now be necessary, in order to prevent risk to the angler that he should have two or three professors of natural history with him at the river side. This was a plausible view of the case for sympathy, but there was no sympathy to be held with the respondent or the local public in this matter. Who was the respondent? He was minister of the parish of Dunsyre in the county of Renfrew. He was, therefore an educated man, and not an ignorant boor. He was well acquainted with fishes, was not an innocent youth, or a stranger from Edinburgh or Glasgow, who might have by inadvertence killed a single parr. Mr. Clerk Renton's experience as an angler, from his earliest days, had been wide and large, and of a varied kind, and not only had he had experience on the rivers of the south, but since he had come to Bridge of Allan some years ago, he had not ceased angling, and he must therefore, know well the *salmonidæ* of the river Forth and its tributaries. Mr. Renton possessed great leisure, and no doubt must have read of the experiments on the Tweed, and also have become acquainted with many of the treatises which had been published upon the *salmo* question. But these were not all the reasons why this was not a case of hardship upon Mr. Renton—he had come into contact with the Fishery Board before for taking yellow fin. He had been

charged with the offence but pleaded guilty to taking a smolt, however, it came out perfectly clear in the evidence that Mr. Renton and every fisher in the district knew the decision given in a like case to this about twelve months ago against Spalding, who was convicted for killing this very fish. Nor could he say that he had much sympathy with the local public in this matter. They had it from all the witnesses for the defence that they perfectly well knew that a yellow fin was distinct from a yellow trout. The defence was not actuated by any desire to vindicate any great public privilege, or to determine a moot point in natural history, but to obtain a decision for local anglers by which they might be allowed to capture these immature fishes which fall victims to the merest tyro in angling. They must look to the object of these salmon fishing acts. After reviewing the rise and history of pisciculture, Mr. Barty went on to say that the object of the fishery laws was to preserve a very valuable article of commerce and nourishment to the people. But for them to the rivers, by various causes—pollution, poaching, &c—would become completely depopulated. It was, therefore, quite clear that one of the first steps of the fishery Board was to protect the fish; and the extent to which the destruction of the young fish went on in Scotland was before the court in evidence. It was sworn to that on the Tweed alone about 5,000 were killed in a year by the rod alone. These fish might easily be distinguished by the common angler from the young of the yellow trout by their silvery coat. But they were told that the yellow trout was sometimes silvery coated. That might be so in the case of the loch trouts. He did not deny that perhaps even a river trout might be found so coated, but it was only one in a thousand that would be found with the silvery coat on. The angler's course then was quite clear—to throw back all the fish with the silvery coat which he hooked. The result would be that he would save dozens of smolts, and lose perhaps only one yellow trout out of 200 he might put in his basket—and that trout an immature fish and one which he ought not to take at any rate. Under the Salmon Fishery Acts "parr" was included as being synonymous with salmon. There was no doubt that all parr were not salmon, and salmon fry were not all sea trout. There were certain parrs which were the young of the common trout, but the reason for putting the parr in the interpretation clause was that 9-10ths of the parr were salmon fry. It was thus necessary to include all parr to save the salmon, and there was not great harm to anglers in doing so. The section under

which the complaint against Mr. Renton was now brought was the 18th section, which imposed a penalty for "wilfully killing or having in his possession smolts or salmon fry." And by the interpretation clause of the Act 1862 "salmon" is made to include "bull trout, sea trout, parr, and other migratory fish of the salmon kind." All that he had to do in proving this complaint was to prove that they were migratory fish of the salmon kind. Mr. Renton's defence to this complaint was of a two-fold character. In the first place he alleged that the fish killed were not migratory fish of the salmon kind, and in the second place, if they were migratory fish, he did not wilfully kill them. The first point to be made out was—what are these yellow fins produced? He had already mentioned that a case had been tried in that court 12 months ago, in which it was held that the lad Spalding had been guilty of a contravention of the statute. He (Mr. Barty) contended that that case might be held to be *res judicata* in the present one as far as concerned the yellow fin, and whenever a case was now brought up about these yellow fins that case of Spalding's would have to do with it at some stage or other, and must be held to be *res judicata*. In this case it was admitted for the defence that the fish libelled were yellow fins, and if he had chosen to stand by the previous case, as he was entitled to do, there might have been little question about the matter. but the Fishery Board did not want to take advantage of the public in that way, but to give every satisfaction to the local angler they had proved the case over again. He, however, must remonstrate on the part of the Board against it being expected that whenever a case occurred in future they should bring down scientific witnesses to prove the fact. There was another view that might be taken of this case, and it was this: supposing the previous case not to be held *res judicata* the same onus would have lain on the defence to prove that the fish were not yellow fins, but the Board had not founded upon it; and even although a question had arisen for the first time, they could not have brought more clear or satisfactory evidence, or evidence which would have placed more clearly the point beyond dispute than was brought forward in this case. They had to deal with the point: were these fish legally taken by Mr. Renton; but there was no necessity for mixing up this point with that of what yellow fins were. The evidence given in this prosecution might be held to be of three kinds—first, was the local evidence, second, the evidence from the Tweed, and third the scientific evidence. The evidence on behalf of the respondent seemed entirely limited to the



locality. For the prosecution there were three or four local men who had in recent years altered their opinions as to what these yellow fins were, but they had been produced merely as a specimen of what they might have had from the locality, and they were produced to show that in the district there were intelligent men who had held for years the opinion that these fish were the young of sea trout. He did not think, however, that the local evidence was of great value in determining this case. These men were unable to give any decided opinion upon the point of what yellow fins were. The local evidence for the defence was to a certain extent strong, and strongly showed the obstinacy of local prejudice, and the most deplorable ignorance that existed as to the history of the yellow fin. They had for the defence some of the most extraordinary opinions given which he had ever heard in a court. One witness stated the parr came up from the sea, and if he did not think that now, he did at one time, and that all yellow fins were the females of ordinary yellow trout, and then there was the opinion which was stuck to with the strongest possible pertinacity that the red mark on the dead fin was an infallible sign of a yellow trout. Now, if there was any truth in scientific knowledge at all—if there was any truth in the great number of scientific works recently published, and which were accounted authorities, all these opinions were utter and unadulterated nonsense. And that was the sort of evidence upon which the respondent relied in this case! The second part of the evidence for the prosecution was that from the Tweed. On the Tweed now there was no doubt as to orange fins being the young of one sea trout or another, and it had been proved that the orange fin of the Tweed was identical with the yellow fin of the Allan. Therefore, the evidence gathered by the Tweed Commissioners might be held to be imported into this case so far, for they seem to prosecute regularly for killing yellow fins, which were the same as orange fins which were the young of a sea-going trout. The third branch of the evidence for the prosecution was the scientific evidence; and it seemed to him to be the weakest part of the case for the respondent that he had been unable to produce a scientific man who would contradict the evidence that had been led for the prosecution. Even the counsel for the defence would admit that the evidence of Dr. Günther had settled the point in regard to what these yellow fins were. Dr. Günther was the highest living authority upon this subject, and no scientific man would dare to contradict him. They had Mr. Brown of Perth, who was without doubt a scientific man, and although he

was in little confusion on the subject of bull trout—and he was not surprised at that, for what was bull trout on the Tweed was not bull trout on the Allan, and not bull trout on the Tay—there was not the least difference in his opinion from that of Dr. Günther that yellow fins were the young of a *salmo* of the migratory kind. Then they had Dr. Young from Glasgow, and Dr. Young's evidence appeared to him to be exceedingly clear and satisfactory. And the slight error into which he was adroitly entrapped by Mr. Macdonald, instead of showing the mistakes of scientific enquiries and of anatomical examinations and opinions, only proved their correctness. Because as they would find on looking into Dr. Günther's book, the Lochleven trout had the remarkable characteristic of having the same number of pyloric appendages as the sea trout; it had also the same number of vomerine teeth, and its general appearance and colouration were the same as those of the ordinary sea trout. No doubt he might have decided the matter by counting the number of scales along a lateral line to the back fin, but Dr. Young did not examine it because the fish was slightly the worse of the wear, and possibly could not be examined, or must have been examined by a good microscope. And then they must bear this in mind, that there was no absolute probability that these Lochleven trouts were not really salmon trout. Their migratory friend Mr. Walsh had that theory, and he was not aware that it was a false theory, for at one time Lochleven had connection with the sea. Thus they had these scientific witnesses all agreeing in saying that the fish called yellow fin (libelled) was the young of a migratory trout of the salmon kind, with one exception of which Dr. Günther was doubtful; and they also agreed that there were certain great anatomical distinctions between the sea-going trout and the yellow trout. Dr. Günther explained this most clearly by the number of the pyloric appendages which never seemed to do more than approach in the two classes of fish—the average number in the yellow trout was 35, in the sea trout somewhere about 48 or 49, while in the sea trout peculiar to the Forth, called *brachypoma*, they never went lower than 45. That seemed one of the best possible distinctions, even in their earliest stages of growth. Again, the scientific evidence was uncontradicted, and most clearly showed that yellow fins generally were the young of a sea-going trout. Besides this scientific evidence produced in court, he would refer his Lordship to a number of scientific writers upon the subject. The "*Rod and Gun*," by the late Mr. James Wilson, pp.

186-7 and 190 ; a Paper communicated to the Royal Society by Mr. Shaw of Drumlanrig, in 1843 ; Dr. Parnel's work on the fishes of the Forth ; a Report on the *salmonidæ* of the Tweed, published in 1867 ; Dr Günther's "*Catalogue of Fishes in the British Museum.*" Then, again, it was proved that the yellow trout was easily distinguished from the young of the sea-going fish in so far as the latter had the migratory coat on. He quite believed that these yellow fins, before they put on their migratory coat, were not unlike certain river trout ; but the only safety for the angler was to throw back all fish with the silvery coat, it being a mark by which the river and the sea trout could at once be distinguished. As to the hybrids, there could be no difficulty in distinguishing them, for they had it on the best scientific authority that a preliminary to their going to the sea was their putting on the silver coat. But that question of hybridity did not enter into this case, because if they were found with the silver coat on it was the clear duty of the angler to place them in the water again. Mr. Russell's work was quoted as showing the doubt and confusion which existed as to these fish, but he had no doubt as to what the orange fin of the Tweed were, and he challenged the counsel for the defence to deny if they did not precognosce Mr. Russell, and that his opinion was that there was no doubt that the orange fin of the Tweed and the yellow fin were the young of a sea-going trout.

Mr. MACDONALD.—I will deny it.

Mr. BARTY said that the agent for the defence had done so then. Mr. Russell, through his book, took it for granted what the orange fin was, and it showed by implication that he was clear as to what they at least were—that they were sea going fishes. It was not perhaps altogether extraneous matter to draw attention to the interpretation clause of the English Act where this special Dunblane fish was included among the salmon kind by the local name of "yellow fin ;" and that showed at any rate that the framers of the English Act were perfectly satisfied as to the fish being a migratory fish of the salmon kind. He held, therefore, that these fish had been clearly proved to be migratory fish of the salmon kind. Now as to the second point—were the fish wilfully taken ? Now the commission of any criminal act was held to be wilful, but a special exception might be claimed in a case of this kind. A person might go away to a burn and fish, not knowing that there were migratory fish of the salmon kind there, and land and take a parr, and in that case no doubt his Lordship would be inclined to hold that it did not come up to what

was meant by the Act as wilful. Nor was one who hooked one of these migratory fish on an artificial fly liable to be charged with wilful taking, and the words of the Act "wilfully take or have in his possession" seemed to apply as much to the possession as to the taking. An angler could not avoid taking—the fish would come to his hook—but he could avoid having them in his possession. It was the worse for Mr. Clark Renton that he knew of his Lordship's previous decision on this matter, and that he thereafter took yellow fins. There could be no doubt but that he wilfully took the fish, and he must run the risk of a heavy penalty. No man should go to fish unless he knew what he was going to fish for. Mr. Barty went on to speak to the question of expenses, and afterwards said that after the decision of last year a rebellion took place among the local angling world, and they were determined to resist the law and try to overturn that decision. This was a different state of matters from what would have happened with an innocent stranger taken up for killing one of these fish, for the case had been twice adjourned at Mr. Renton's request, and the prosecution had been compelled to bring Dr. Günther from London and all these people by the resistance of Mr. Renton.

Mr. MACDONALD, for the *Defence*, submitted that it was a strange proceeding to say that Mr. Renton should have known that he was doing an illegal act before Dr. Günther and Dr. Young were examined, when it was necessary to examine these gentlemen to prove that the act was illegal, and yet at the same time to say that the prosecutor was justified in bringing them at the respondent's expense to prove that about which there was no doubt whatever. It was quite true that there was a decision about a year ago in this court in the case of a young lad who for the first time was accused of wilfully taking a fish, knowing it to be a fish of the salmon kind, and a conviction followed upon the occasion, but it was not true, and the facts of the case showed that it was not true that the public, even the prosecutor, or the Fishery Board, were satisfied with that. It was also not true that they believed in the result of a prosecution after a trial of half-an-hour, and in which the only evidence produced was that of Mr. Halliday and his friend Mr. McDonald from Doune Castle. That proof was anything but satisfactory or conclusive to the general public, and that there should be a conviction merely from the fact of taking such fish. It rather appeared that the general understanding amongst fishers in the district, and that with one or two exceptions who were brought forward for the defence, and there was nobody in the

district who held any other opinion, but it had been left to this case to show that that was not the fact. On the contrary, it had been shown that Mr. Halliday and Mr. M'Donald were the only two people in the whole district who thought that yellow fins were the young of the salmon kind. No doubt they might be right, and it must have been a great satisfaction to them to hear that the number of pyloric appendages in one of these yellow fins when it had been slain tended, in the opinion of Drs. Günther and Young, to confirm their opinions upon the subject. But in reference to the matter of the scientific position of this question he thought he could not do more than quote the opinion of Dr. Günther himself. At page 101 of the Tweed Commissioners' report he said "that he laid no weight whatever on external signs, the tail, spots, gills, &c., and that science would prove the best guide in matters salmonoid; and he did not think that in the present stage of their knowledge practical fishermen would profit much by it." That was in 1866 when Dr. Günther said that the knowledge of scientific men was such that they were unable so to guide the practical angler as to make him safe in dealing with fish of this kind. That was certainly six years, but scientific knowledge could not be expected to get into the heads of practical fishermen fishing on the banks of the Allan by mere intuition; and no more clear or certain way of making it reach a district like this was by bringing the evidence of Drs. Günther and Young. It was the first time he had heard, either here or anywhere else, that it was part of the education of a clergyman to know the anatomy of fish, when the knowledge of those matters was uncertain, and scientific men could not make that knowledge of such use to practical fishermen so that they could much profit by it. Now, if that was the state of matters in 1866, let them enquire how a new state of matters was supposed to have arisen in this part of the country. They had been told that certain experiments had been carried on on the Tweed, and conclusive evidence procured to show that certain fish which so much resembled fish in the Allan, as to seem in the opinion of the learned Procurator-Fiscal to have been proved to be the same fish, were the young of the salmon kind, and that that must be sufficient for this district also. It would be quite a sufficient answer to that, to say that he himself had stated that a particular fish produced was a yellow fin, when every witness who was examined stated it to be a parr, and the word "parr," unknown to him, was on the bottle in which it was preserved, and the learned Procurator-Fiscal had as much opportunity of

gaining information, since this case began, as any non-scientific man could. He did not know whether the learned Procurator-Fiscal was a practical fisher or not, but he certainly had given sufficient indication to say that it was not so very easy in the present state of information—and no doubt he was well steeped in information—as to what were fish of the salmon kind from casual inspection. As to the Tweed Commissioners having made conclusive experiments, the fact was that they had not yet concluded their experiments, for no later than March, 1871, the experimental committee of the Tweed Commissioners marked a large number of orange fins and issued a notice in reference to those anglers and others who might capture a marked fish. So that they were still engaged in prosecuting their experiments for the purpose of ascertaining what became of these orange fins. If that was the state of matters on the Tweed, what was the reason that it should not be the state of matters on the Forth? They had had evidence brought forward to prove what nobody denied that these yellow fins, as well as certain classes of common trout which did not have the silvery coat on, go down the river, and that many of them go the length of the brackish water; but it was a little remarkable in this case that there was not one tittle of evidence to show that they ever got beyond the bounds of fresh water. He ventured to make this suggestion that if the Forth Commissioners, as Mr. Walsh was going to say when he was stopped, instead of raising criminal prosecutions, would really make a few practical experiments they would far sooner satisfy practical men upon such a subject as this, and it would be far better than trusting to distant experiments carried on in another river with fish they never saw. He said that that was not a fair or reasonable way to come to a conclusion on this subject. His friend said that the defence called upon him to go into a long series of experiments upon such a matter, but if the evidence which he had led was sound, no long series of experiments would be required, because no doubt, theoretically, the evidence he had led was of considerable strength and it would not need many experiments for the purpose of showing that it was sound. If it was sound a few experiments would satisfy every one, and get rid of all the difficulty that was continually arising in the matter; and why these experiments were not entered upon by the Forth Commissioners, if they had such zeal upon this subject, it was utterly impossible to guess. They had been for 10 years in existence, and what had they done in the way of experiment for the purpose of carrying out the duties imposed upon them under the Act of

Parliament? Literally nothing! And then when it was said that these fish were sea-going fish, the only evidence brought forward was they were seen down as far as Kincardine-on-Forth. It was not fair and just. They were aware of the mistakes of scientific men, and that they had entertained erroneous views in reference to this subject—why not let them have some practical experiment to get rid of these mistakes in a right and proper way. Mr. Buckland held the opinion that one of the best known and certain marks of the common river trout was the red tip to the dead fin. That this was so there could be no doubt. Everyone who knew anything of Mr. Buckland's views knew that this was one of his most confirmed opinions till lately. But he had gone back upon his opinion and stated that he was wrong, but were the public to be punished because such men as Mr. Frank Buckland went wrong and did go wrong. If Mr. Buckland had not changed his mind, or if the Forth Commissioners had thought proper to try this case in 1865, they would have had Mr. Buckland most triumphantly upon this occasion, and the scientific evidence led for the defence would have been conclusive upon the subject. There was no doubt but that there was more light coming in upon scientific minds upon this subject, and it was not reasonable or fair to convict any man of an offence which was criminal in its nature until the results and known conclusions of science could go along with that which was perfectly well known to all honest and respectable men in the place. But as regarded this question it was a little surprising that the enquiries of Dr. Günther had never yet reached this district, and in this case, as he himself had admitted, he had learned a most interesting fact of natural history—namely, that his calculations as to the number of pyloric appendages were set at naught by the fact that in one of the fish produced there was a smaller number of pyloric appendages than he had ever seen before in a fish of the kind. As regarded the fish on the table, there was no doubt about five of the fish libelled, but one of them the Doctor said was a hybrid, and he (Mr. Macdonald) had yet to learn that under any Act of Parliament he was to be punished for taking a hybrid, when it required a scientific man to examine it. Then there were a number of facts which Dr. Günther should have stayed to learn. It was a curious and interesting fact that they had fish which were the same as those on the table, and in every particular by which fishers shall know them to be sea-going fish, which never can reach the sea at all and never do reach the sea—facts which were striking to the common angler, when he is told that science is

satisfied that these fish do go to the sea, and which he knows, as a matter of fact, never go to the sea at all. It was the fact that these fish were found above the Mill of Ardoch ; and whether it be true or not as the learned Procurator-Fiscal had suggested, that sea trout had been placed in these waters years ago, it was none the less true that these fish never had been at the sea and never could go to the sea and come back again. But it did not stop there. Under this Act of Parliament, Mr. Martin, who was fishing in Lochleven last week, would, upon the evidence of Dr. Günther and the other scientific evidence which was to set this matter at rest, and upon which it was safe to convict a man—have been guilty and would have been convicted by his lordship of having in his possession a salmon parr, for it was not necessary that he should be seen to take it. Why then when a learned gentleman, and a perfectly honest man, sat down anatomically to examine this fish did he know so little about it that he actually placed himself in the position that if he had been a witness in another case his evidence would have been founded on, as conclusive, to convict a man as a poacher under this Act. Two fish were shown him taken out of the same waters, and neither of these fish had access to the sea, yet the evidence of Dr. Young was that one of them was a salmon parr and that the other was a sea trout. His friend, the Procurator-Fiscal, said that probably Dr. Young, from its having been so long time out of the water, did not count the scales. Why, there was not a single scale wanting, and if it was necessary to count the number of scales before determining a fish, and not safe to depend on the other appearances before him, he (Mr. Macdonald) wanted to know why Dr. Young did not do it. Just because he did not know that there was a trap laid for him. But the trap was laid, and he fell into it, and he was caught in it, and no amount of wriggling would get him out of it. He was like a fish well into the basket upon the particular question—the trap was laid for him, and effectually laid for him, to show that Dr. Young deposed to a fish as a fish ready to visit the sea which would never have a chance of getting there. If this was the evidence of scientific men upon this subject, then questions of what the yellow fin and the young of the sea trout were was to a certain extent an unexplored region in the natural history and ichthyology with reference to the fish of the salmon kind. Let them enquire how the matter stood with reference to the bull trout question. One of the witnesses for the prosecution, who was brought to say they were fish of the salmon kind, said that he would like very much to see them all destroyed, for they



were most destructive to the young salmon. That was the state of scientific knowledge just now, but then Dr. Günther thought that that was a mistake. The Duke of Northumberland had been engaged for a very long time endeavouring to extirpate the bull trout, because it was supposed that they were destructive to the young salmon. Dr. Günther thought that was quite wrong. Could anything be more clear from all than this, that yet as regarded scientific enquiry, a large number of these questions were in a crude condition, and were known by the general public to be so. He would like to know what evidence had been led to satisfy his worship that these yellow fins and those fish which put on the silvery coat in the spring were not in a crude and unsatisfactory condition? and one fact of a remarkable kind, which he did not know before, but which came out on this occasion, and tended greatly to show there was great difficulty in this case was, as regarded the Allan, that these fish were found at all seasons with this silvery coat, but that when the fish was caught in April or May it was almost always entire, covering the whole fish, but in the months of June and July they were found with less and less of it. A question had been raised as to whether the fish were putting on or taking off the coat, but if it was the fact that when they were caught in April they had only a ring behind the head, and as they came into May they had it all on, but less of it in June, and still less in July, this clearly indicated that the silvery coat was put on for some temporary cause, although the fish did not go down to the sea. This fact proved conclusively that though they presented the appearance, they did not go down to the sea. If Dr. Günther lived a short time among practical anglers he would learn some few facts about these yellow fins which would be valuable to science, and the Fishery Board would spend a little money to more advantage, and much more pleasantly, if they tried some practical experiments, than in prosecuting such cases as this. It would be a much more fair and satisfactory way to spend it—to themselves, Dr. Günther, to Mr. Barty, the unfortunate respondent, and infinitely more so to his lordship—(a laugh.) He had quoted Mr. Russell's book for the purpose of showing that when one went beyond the true *salmo salar* about which there was no doubt whatever, "there does lie a vast field almost pathless and thickly covered with an underwood of doubt and confusion. There were perhaps a dozen species of trout of different habits and almost all known by different names in different localities." Could any practical man reading that sentence come to any other conclusion,

whatever Dr. Günther might happen to have worked out in the British Museum from his enquiries and investigations, that the information beyond what was known of *salmo salar* was still in a doubtful and unsatisfactory condition. The facts were "in darkness and confusion, and their confusion was twice confounded by an unsettled nomenclature." There could be no stronger proof of that than what was furnished by the Act of 1861, where, if the information had been clear and satisfactory they would have been spared half a page of names used to describe the different fish of the salmon kind (which he read.) There was no such Act of Parliament in Scotland; the words were "migratory fish of the salmon kind," showing that matters were still in such a crude and unsatisfactory condition that the legislature could not venture to describe the fish. As to the wilfulness of the taking of the fish, it was quite true that a criminal act was held to be wilfully done if it was done; but an act which was not criminal in its nature, but which was made so, not because it was contrary to morality, but from some object of public or local policy, was not held to be wilfully done, unless it is proved to have been wilfully done. The meaning of the words of the Act was, as plainly as possible, that the party accused knew them to be smolts or salmon fry, or other migratory fish of the salmon kind, and could have no excuse for not knowing. If that was the meaning of the Act, how came it to be that for the last 10 years these same yellow fins had been publicly bought and sold? It certainly was not the opinion of the anglers in the district, and until lately Mr. Halliday was in the practice of taking and selling them, but he was now the exception to the rule, for he thought now that he was satisfied that they were fish of the salmon kind. Mr. Renton was not satisfied, and until it was proved that they were so, Mr. Barty was not entitled to prosecute. As to the previous conviction, he was not convicted of taking a yellow fin, but a salmon smolt, and if the evidence of Dr. Günther was required to settle this question, that was the most conclusive reason why there should be no conviction in this case. If anything was previously settled, then Dr. Günther should not have been brought here at his expense as the learned Fiscal suggested. If there was nothing to settle, he (Mr. Macdonald) could imagine no more unfair way of settling a question of science and placing it in a position of certainty than by placing another man in a criminal dock and pressing to convict him upon scientific proof. It was another reason why no conviction should follow in this case that a gentleman was placed in the dock charged with

wilfully doing a thing which was well known, but which required the highest scientific talent in the country to prove that it was the thing which was alleged. Mr. Macdonald went on to speak of the respondent's bag, spoken to by the watchers, and warned them of their excessive zeal to convict a man, and said that he would give them a piece of advice. He would warn them to be most careful in the future, because there was nothing worse in the evidence of witnesses who were practically professional witnesses, than to throw out hints of motives in the way which these men unfortunately did. They should have known better than upon such a miserable pretence as that about there being three compartments in the bag to raise such a statement as they did.

The SHERIFF here intimated that as he would like to study the books he had been referred to, and the evidence, he would adjourn the case till Wednesday the 19th June current.

#### WEDNESDAY, 19TH JUNE, 1872.

The adjourned diet in this case was held yesterday at Dunblane. The Court was as crowded as on previous days. Sheriff Grahame delivered his decision as under :—The respondent has been brought into Court under the charge of having contravened the 19th section of the Salmon Fisheries Act, 1868, in so far as he did wilfully take from the river Allan, or have in his possession, six or thereby smolts or salmon fry, with the aggravation of his having been previously convicted of an offence under the said Act. In the pleadings for the parties in this case a good deal of statement and argument was introduced bearing upon the question of the expediency of the recent salmon legislation of the country. On the one side it was characterised as harsh, uncalled for, and injurious; on the other side as mild, necessary, and beneficial. But with this question the Court has nothing to do. If our salmon legislation is wrong, it is for the Legislature to repeal the law or provide an amendment of it. The sole duty of the Court in administering the law is to carry it fairly and honestly into effect. It is, of course, not to be doubted that in the performance of this duty there may sometimes be difficulties arising from the nature of the subject with which the Legislature is dealing; and when, as in the present case, the subject of legislation is one in regard to which not only are the views held by a large portion of the community opposed to those on which the legislation is based, but when, further, that legislation proceeds on principles or theories in

regard to which the truth is only in course of investigation and discovery, and is still, to some extent, involved in darkness and doubt, the proper administration of the law, especially with reference to the extent of its application, becomes a question of some nicety, and more difficult to determine than in cases where the principles to be applied are generally recognised and clearly understood. Now, while it would be, of course, beyond the province of the Court to insinuate, even if it believed it (which it does not), that recent salmon legislation is based upon false theories as to the history and habits of that fish, still the circumstance cannot be overlooked that the history of the salmon family has not yet been so fully written, or the distinctive family features so clearly delineated as at once, and without the aid of scientific investigation, to afford a test by which to try and determine the true character of every claimant who, in respect of his general appearance or outward dress, seeks to be held entitled to the privileges and immunities which the Legislature has enacted not only for the protection of the royal *salmo salar*, but of the *salmo albus*, *salmo eriox*, *salmo brachypoma*, and other less distinguished branches of the salmon family. Indeed, the difficulties connected with the natural history of the salmon, and the point at which scientific investigation has arrived in regard to this subject, may be in some measure inferred from the history of our various salmon fishery statutes. For while these statutes, whether relating to England or Scotland, were at first of comparatively limited application in regard to the fish which they recognised as entitled to their protection, the statutes more recently passed have extended their protection much more widely; and how wide the salmon family circle has now become in the eye of the Legislature may be seen from the following enumeration which the English Salmon Fishery Act of 1861 makes of the fish which are to be recognised and protected as salmon:—"Salmon," it declares, "shall include all migratory fish of the genus *salmo*, whether known by the names hereinafter mentioned—that is to say, salmon, cocker, kipper, kelt, laural, girling, grilse, botcher, blue cock, blue pole, fork tail, mort, peal, herring peal, may peal, pugg peal, harvest cock, sea trout, white trout, seivin, buntling, guinaid, tubs, yellow fin, sprod, herling, whiting, bull trout, whitling, scurf, burn tail, fry, samlet, smolt, smelt, skirling or scarling, parr, spawn, pink, last spring, hepper, last brood, gravelling, shed, scad, blue fin, black tip, fingerling, brandling, brondling, or by any other local name." Dr. Alexander Russel, of the *Scotsman*, in his work on "The Salmon,"

says that, "setting aside the *salmo salar*, or true salmon, in the question about 'fish of the salmon kind,' *salmo eriox*, *salmo trutta*, *salmo albus*, &c., &c., lies a vast field, almost pathless, and thickly covered with an underwood of doubt and confusion. There are, perhaps, half a dozen species or varieties, all more or less different in habits, and almost all having different names in different localities; besides which, the same name is often applied to different species, and the young and the adult of one species are sometimes classed as two species, sometimes *vice versa*." In Scotland, indeed, many of the names above quoted would not be recognised as of the salmon family, but still in this country, as well as in England, there has been, year after year, a widening of the family circle; and the success which in the face of the strongest opposition has attended the persistent and energetic efforts of the parr to obtain a recognition of his right to the family privileges, has helped greatly to break down the old exclusiveness, and has made it more easy for other claimants to get at least a fair hearing, and have their claims to a place among the privileged "upper ten" carefully determined. To the Sheriff Court at Dunblane there has now been referred the case of a claimant, who under the name of the "yellow fin," asks to be recognised as one of the migratory salmon family, and therefore entitled to the special protection of the statute. Into a consideration of the proof which has been led in regard to the facts of the respondent having taken or had in his possession the fish libelled, and of these fish being recognised in the district of the Forth and its tributaries as yellow fins, it is unnecessary to enter. These facts are not disputed by the respondent at the trial, and the only question with which, as preliminary to the pure question of the natural history and character of those fish the Sheriff-Substitute has to deal, is whether, even on the assumption that they are fish of the salmon kind, there are not, as was strongly urged on the respondent's behalf, in the circumstances of the case good reasons for holding that the penalties of the statute cannot be enforced against him. It cannot be denied that there are conceivable circumstances under which the taking of the fish falling under the prohibition of the statute could not be held to infer an offence. The investigation of scientific men may determine that the statute in its general description of fishes, which it declares to be unlawful to take or possess, includes a certain class, but it does not therefore follow that the penalties of the statute are without reference to surrounding circumstances necessarily to be enforced against the taker

or possessor of these fishes. There must be reasonable ground for presuming that the party accused had reason to know or suspect that the fish came under the application of the statute. His knowledge of the statute is, of course, to be presumed. *Ignorantia juris neminem excusat*. But there are circumstances in which ignorance of the fish taken may excuse the taker. The state of public and published scientific opinion in reference to the fish may be such as to make it unreasonable for any one but a man of science, whose attention has been specially directed to the fish in question, to believe, or even suspect, that they fall under the prohibition of the statute. In such a case, and in the absence of any authoritative warning, the Sheriff-Substitute does not think that any penalty would be incurred, or could be enforced. In the case of crimes, properly so called, *mala in se*, the presumption is, of course, different from that which is to be given effect to in the case of mere *mala prohibita*. When a crime, properly so called, has been committed, the inference always must be that it has been wilfully committed; but when the offence is one which is merely the creature of statute, and, as in the present instance, only *quasi* criminal, its wilful commission is not always to be inferred; and a case might occur in which the presumption of wilfulness might be met and overcome by circumstances which would not only extenuate, but even justify, the otherwise illegal act. In the present case, however, it has to be observed, further, that it has been argued that because the expression "wilfully take" is used, that guilty knowledge is not to be presumed without proof of actual knowledge of guilt on the part of the accused. To the Sheriff-Substitute, however, it appears that the word "wilfully" in the Act has not the effect which is here sought to be given to it; for it has been here introduced, the Sheriff-Substitute thinks, not for the purpose of compelling the prosecution to prove knowledge of guilt, but only in order to protect anglers from incurring penalties in consequence of prohibited fish being unintentionally hooked and brought to land, an occurrence which must often happen in the case of the most careful of anglers, and which, unless exceptionally provided for, would infer a contravention of the statute, and thus put a stop to almost all river angling whatever. The application of the principle which determines the effect to be given to the knowledge or ignorance of the respondent as to the character of the fish in question must be here made altogether independently of any effect to be given to the expression "wilful," as it occurs in the statute, founded on where, as above

explained, it must have a mere technical and limited interpretation. What, then, the respondent must do in order to free himself from the application of the statute on the ground of his ignorance of the character of the fish he has taken, is to show that he had no reason to think that the statute applied to those fishes, and that the fish called "yellow fins" were not taken wilfully. Now, how stands the matter with the respondent? Apart from the presumption of the migratory character of the fish in question arising from their silvery appearance, which, if not peculiar to, is at least always found in the case of sea-going fish of the salmon kind, there is this most important circumstance that in the Dunblane Sheriff Court, whose jurisdiction extends over the greater part of the river Allan in which the respondent is in the habit of angling, and out of which the fish in question were taken by him, a prosecution was in June, 1871, brought, and a conviction obtained after proof against an angler for taking from the same river fish of the same kind, and described under the same name as those for the taking of which the respondent has now been called upon to answer. In giving judgment in that case, the Sheriff-Substitute in open Court, and as afterwards reported in the newspapers of the district, said "that he felt no hesitation in deciding that the fish produced fell under the statutory prohibition. These fish, which were known in the district under the name of 'yellow fins,' were in their characteristics different from the ordinary yellow trout, especially in their having the silvery appearance which at a certain season of the year is assumed by all fish of migratory kind, and to whom these scales seem to be given by nature as a preparation for their life in the sea." In the face of this decision, the respondent is barred from pleading ignorance of the character of the yellow fins as a defence against the present charge. He may, no doubt, plead that his own belief as to the character of these fish remains unchanged by the decision referred to. He may still believe that they are not fish of the salmon kind, but he does not plead ignorance of the fact of which he must have been aware, that in one instance at least, the Court, which deals with fishing questions arising in the district of which he is in the practice of angling, held an opposite view of the character of "yellow fins," and decided the taking of these fish to be an offence under the statute. The respondent's private belief, supported though it may be by the general opinion of the fishing public of the district, cannot relieve him from the responsibility incurred by his now having acted in opposition to the decision of the Court; and indeed, from some of

the evidence led and other proceedings in the present case, there is reason to think that the taking of yellow fins by many of the anglers of this district, and specially by the respondent, has been persevered in with an avowed profession of willingness to undertake the risk of a prosecution, or even with the purpose of inviting it, and thus obtaining a more thorough investigation of the question, and a more authoritative decision upon it than it has yet received. The question on which the decision of the present case comes to depend is really as to the natural character of the fish in question, and specially whether they are migratory fish of the salmon kind. Upon this point a great amount of evidence from scientific men and naturalists, as well as from practical anglers and fishermen, has in the present case been brought to bear. Of this evidence the Sheriff-Substitute has no hesitation in saying that the evidence given by the more strictly scientific witnesses is by far the most valuable, and is to be regarded as chiefly affording the materials for a trustworthy settlement of the question at issue. While giving all due weight to the honesty and shrewdness of many of the non-scientific observers of the natural history of our various river fishes who have given evidence on behalf of the respondent, the Sheriff-Substitute feels that he must specially look to the testimony of the two eminent scientific witnesses, Dr. Günther, of the British Museum, and Professor Young, of Glasgow University, who were called for the prosecution, and who severally gave detailed and clear statements of the investigations made by them with reference to the question at issue, and of the results to which these investigations had led. The opinion of these witnesses must, the Sheriff-Substitute thinks, be held to be conclusive of the question at issue: and although alleged facts have been deposed to by some of the other witnesses, which at first sight appear to be contradictory of the conclusions arrived at by Dr. Günther and Professor Young, the Sheriff-Substitute, without impugning the honesty of any witness in the case, or the faithfulness of the description of what he believed he had observed, thinks that the alleged facts are all either capable of an explanation consistent with the results arrived at by the scientific observers, or that the alleged facts deposed to have not been observed with the accuracy and care which is a necessary condition of any trustworthy investigation in reference to such nice distinctions as are involved in the settlement of the question now in dispute. The observations of non-scientific men in matters of natural history are not to be set aside as worthless, but it is matter of notoriety how often the



observations made by such observers have, when brought to the strict test of scientific investigation, be found to be erroneous ; and in this very matter of the natural history of the salmon, in how many points have the opinions of mere practical anglers been obliged to be abandoned in consequence of the contradictions of a more accurate scientific enquiry ? Of this the history of the parr controversy is a notable instance. In that as in the present dispute the men of scientific research and the practical observers were for a long time at issue, and then, as now, the Sheriff-Substitute thinks that science must be held to have gained the victory. What, then, is it that science holds to be established in reference to the character of the fish in question ? As represented by Dr. Günther and Professor Young, science holds that these fish, popularly known under the name of yellow fins, are migratory fish of the salmon kind. They are so, these witnesses say (1) in respect of their general outward silvery appearance ; (2) of their anatomical structure ; and (3) of their identity with the "orange fins" of the Tweed, which fish the experiments of the Tweed Commissioners have now conclusively proved to be the young of the sea trout, and therefore migratory fish of the salmon kind. First, then, in reference to the outward silvery appearance of the fish in question, both Dr. Günther and Professor Young state that the silvery coat with which these fish are clothed is to be regarded as a distinctive mark of their being migratory fish of the salmon kind. The assumption of the silvery coat is a necessary preparation which sea-going fish make for their sea voyage, or, to use in this instance an appropriate west country colloquialism, for going "down the saut water ;" and in the case of river fish, is to be held an almost infallible test of a migratory and sea-going habit. Nor is this inconsistent with the well-known fact, that in the case of certain fish which inhabit lochs having now no communication with the sea, a similar silvery appearance is to be seen. In the case of Lochleven trout, which afford the most notable example of the phenomenon referred to, it must, however, be kept in view, as having an important bearing on the character of this fish, that the loch which it inhabits had most probably at one time a communication with the sea, and that the fish themselves possess in a most remarkable degree the features of the salmon and sea trout. A well-authenticated tradition exists in the Lochleven district as to the loch having formerly had such a communication with the sea as to admit of the passage of salmon into the loch, and also to the fact of salmon in former times having

been netted in the loch ; and Sir Robert Sibbald, in his "History of Fife and Kinross," published in 1710, and republished at Cupar in 1803, says :—"Lochleven abounds with fine fish, such as salmon taken in summer." Further, the Lochleven trout (as seen from "Günther's Catalogue of Fishes of the British Museum," *Salmo Levenensis*, page 101) is distinguished from all the non-migratory trout in Scotland, and agrees with the salmon and sea trout in respect of the great number of its piloric appendages or cæca, which average in number in the Lochleven trout about sixty, being the same number as is found in the salmon ; while the *salmo fario*, or non-migratory trout of the Forth and its tributaries, the number of these appendages is found to range between thirty-five and thirty-seven only. Then, in the second place, the Lochleven trout has, like the salmon, a single series or row of teeth along the vomer ; and, indeed, the only absolutely distinctive feature of the Lochleven trout, as compared with the salmon, is to be found in the number of the scales which it has behind the adipose fin forwards to the lateral line, these being, as stated in Dr. Günther's work above referred to, page 103, fifteen in number ; while in the salmon they are (Günther's Catalogue, *salmo salar*, page 13), "constantly eleven, or sometimes twelve." The great resemblance between the Lochleven trout and salmon is known to all fishers, and indeed the resemblance is in some instances so great that, except for the distinctive character of the scales above referred to, these fish might be held to be identical in character ; and the fact of one of these trout having in the course of the present trial been regarded by Professor Young as a sea trout, after examination, is a very strong testimony to the difference between the characteristic features of the Lochleven trout and those of all the non-migratory river fish. On the assumption—which there is little doubt Professor Young unfortunately made—that the Lochleven trout submitted to his investigation was a river fish, its distinctive marks were those of the sea trout. It is, moreover, noteworthy that Mr. Walsh, one of the witnesses called on behalf of the respondent, a well-known experienced angler, and a cautious and acute observer of the habits of river and loch fish, stated that so convinced was he that Lochleven trout were a species of salmon that he had some time ago published, in a letter to the *Field* newspaper, a statement of his belief that such was the case. At all events, the fact that fish which inhabit Lochleven have the same silvery appearance as is said to belong only to the migratory class of river fish, instead of affording any argument against that appearance being a testing

migratory characteristic, goes far to confirm its trustworthiness. There are, no doubt, as the evidence for the respondent may be held to have established, instances of fish of a hybrid parentage which, without being properly migratory, have more or less of this silvery appearance. These specimens are, however, rare, and it is not a little remarkable that, though several witnesses spoke to the existence at present of non-migratory fish in the Allan and in other rivers having the silvery appearance in question, the only specimen which was produced of a silvery coated fish other than admitted "yellow fins" and sea trout, was the Lochleven trout which caught the Professor. The fact, therefore, of the six fish in question having the complete silvery dress or coat affords the strongest presumption of their being migratory fish of the salmon kind, and is a circumstance which ought to put the respondent on his guard against the dangerous consequences of taking or having them in his possession. In the second place, as confirming the presumption, Dr. Günther and Professor Young refer to the anatomical structure of these fishes. The general form of the fish in question is, they say, that of sea-going fish. The formation of body of the fish in question is longer and not so deep as is the case in the *salmo fario* or non-migratory river trout. The caudal fin of these fish, also, is longer, formed of more delicate rays, and less excised than in the *salmo fario*, whose body is short and compressed, and whose caudal fin is of stronger rays, with more obtuse lobes—thus forming, as it were, a short strong paddle suited for the propelling of the fish in running water. Thus, from the outward silvery appearance and general formation of the fish in question, it is clear that they belong to the migratory class. But a still further proof of the migratory character of these fish is found in the position and arrangement of their vomerine teeth; for while in the *salmo fario* there are two rows of teeth running along the middle of the palate, in both the *salmo salar* and *salmo trutta* there is but a single row, which runs in the *salmo salar* and in the *salmo trutta* as in the fish labelled on, in a zig-zag line along the palate. These fish thus exhibit in this respect a distinctive characteristic of the sea trout—five of them being, according to Dr. Günther, pure specimens of that species (*salmo trutta*), while the sixth has some marks which, without affecting its migratory character, or preventing its being truly described as a migratory fish of the salmon kind, show it to be to some extent of hybrid descent; and thus, although when shown to the scientific witnesses, the state of these six fish was not such as to admit of the number of their piloric

appendages being observed, and of a complete anatomical investigation being made, the characteristics spoken to by Dr. Günther and Professor Young seem to make it absolutely certain that the fish are migratory fish of the salmon kind. Moreover, the results of the complete anatomical examination which Drs. Günther and Young stated they had made of fresh specimens of yellow fins have further demonstrated that yellow fins are migratory fish. Lastly, in the third place, it has been proved that the fish known in the district of the Forth as yellow fins are the same kind of fish as those known in the Tweed district as orange fins, and that these have, by a long series of careful and well-known experiments made by the Tweed Commissioners, as spoken to by several of the witnesses, been demonstrated to be migratory fish of the salmon kind. Thus, on the whole, the Sheriff-Substitute thinks there has been adduced in this case the most conclusive evidence of the allegations made by the prosecution in reference to the migratory character of the fish in question; and, putting aside the respondent's evidence, on which his case was so largely based, as to the alleged difference in the number and arrangements of spots, and in regard to the coloured markings of the tip of the adipose fin between migratory and non-migratory fish, as not affording, in the opinion of almost all men of science and naturalists, any conclusive or very valuable assistance in determining the migratory, or non-migratory character of river fish, the evidence of Dr. Günther and Professor Young, corroborated as it is by the experiments of the Tweed Commissioners, and the long individual experiences of that enthusiastic and observant angler, Mr. Thomas Todd Stoddart, and other witnesses, affords a threefold chain of evidence which cannot be broken, and which, except by mere strength of assertion of an opposite belief on the part of a number of non-scientific witnesses, the defence can scarcely be said to have even attempted to break. The only other points requiring to be referred to are those of the amount of the penalty to be awarded and of the expenses of the trial. The Sheriff-Substitute has, in the circumstances, felt justified in modifying the penalty to the sum of £2 10s., being the lowest penalty which the Court is authorised to impose in the case of a second offence. But in regard to the question of expenses he has felt some difficulty. In general the successful prosecution of a complaint under the fishery statutes carries full expenses with it, but considering that the object aimed at in the present prosecution was admittedly not so much the conviction of any individual as the settlement of an important question of natural history—an object

which it is hoped may be held to have been in large measure accomplished—the Sheriff-Substitute thinks that the awarding of large expenses against the respondent would be somewhat oppressive. He has therefore, notwithstanding the great length and expensive character of the proceedings, modified the expenses to which the pursuer is held entitled to the sum of £10. The Sheriff-Substitute has thus attempted to give a general statement of the grounds on which he holds a decided opinion that the respondent has been guilty of a contravention of the statute founded on, and incurred the penalty and expenses awarded against him. On the ground stated in the beginning of these notes, the Sheriff-Substitute has endeavoured to abstain from giving any opinion whatever upon the expediency of the restrictions of the statute; and now, in conclusion, he has only to express his belief that whatever may be the different views entertained throughout the country as to the propriety of the enactments of this or of any other statute restricting the practice of either field or river sports, all true sportsmen will agree that, as

“He is no woodman that doth bend his bow  
To strike a poor, unseasonable doe;”

so

“No fisher but the ungrown fry forbear.”

#### S E N T E N C E.

THE SHERIFF-SUBSTITUTE, in respect of the evidence adduced, convicts the Rev. George Clerk Renton of the offence charged, and therefore adjudges him to forfeit and pay the sum of £2 10s., of modified penalty, with £10 of modified expenses, and in default of immediate payment thereof grants warrant for recovery of said sums by pointing of his goods and effects, and summary sale thereof, on the expiration of not less than forty-eight hours after such pointing, without further notice, and appoints a return of such pointing and sale to be made within eight days, under certification of imprisonment for ten days.

The rod, line, and smolts were declared forfeited to the Fishery Board.

MR. WILLIAM ALEXANDER, solicitor, then gave notice for the respondent of an appeal to the Circuit Court, which will be held at Perth in September next.

[This appeal was departed from in respect of [legal advice that there could only be an appeal on a point of law.]

There are by no means wanting in the preparation of the different Scotch Salmon Statutes, signs of an hankering after the legislation which prevailed in the times of Charles I. and II., and of an equally undesirable spirit of arbitrary and restrictive measures directed against the community at large. All will remember the turmoil and afflictions which sprung out of such things in the reigns of these sovereigns as recorded in history. Rivers and tributary streams and lakes in Scotland, like rivers, and tributary streams and lakes in other countries, have natural boundaries. Fish have natural instincts, propensities and habits, which should not be capriciously and wantonly interfered with. But we find power given by the Legislature to *three private citizens* of the state to circumscribe or extend the former by aid of geometry and mathematics, and full authority to the same quorum to endeavour to alter and change, if not to violate, the natural instincts and habits of the latter, by driving them from their usual haunts into others which they may think more suitable, and that by the operations of the building art. The luxurious Romans in the palmy days of the Roman Empire were not behind the moderns in their desire to disturb the members of the finny tribe. A famous ancient author of that era appears to have thought that fishes could understand when aggression happened to be made on their privileges, for he writes, in reference to the voluptuousness of the age in which he lived,—“The fishes perceive the seas contracted, by the vast foundations that have been laid into the deep; hither numerous undertakers with their men, and lords disdainful of the land, send down mortar; but anxiety, and the threats of conscience, ascend by the same way as the possessor, nor does gloomy care

depart from the brazen beaked galley, and she mounts behind the horsemen.”—(*Third Book of the Odes of Horace. Ode I.*)

In short, Parliament delegates its powers to three private persons, and declares that the acts and deeds which emanate from them in the form of “bye-laws,” which phrase includes “all rules, orders and regulations made by the Commissioners,” shall be equivalent to the acts of Queen, Lords and Commons, and “shall be legally binding on all concerned.” No doubt to give a semblance of governmental sanction, the name of the Secretary of State is introduced, but the curious thing is, that while power is given to an aggrieved party to state objections to any bye-law, there is no machinery provided for *hearing* and *discussing*, either *privately* or in a *public manner* these grievances before the Secretary of State. If that government functionary “approve or alter or disapprove of the same,” i.e., the bye-law, and publish it in the *Edinburgh Gazette*, the work is complete. The bye-laws so dealt with are declared “legal and binding on all concerned.” Is there much difference, in fact and principle, betwixt that method and the orders in Council, which were so prolific in the times of Charles I. and II. ? There is no safeguard against passion, or precipitation, or prejudice ; and few people will doubt but these oftentimes lead to error and mischief. Hooker writes, — “Human laws are measures in respect of men, whose actions they must direct ; howbeit such measures they are, as have also their higher rules to be measured by, which rules are two, the law of God and the law of nature, and without contradiction unto any positive law in Scripture ; otherwise they are ill made.” — *Ecclesiastical Polity.*

Hanbury's edition, B. III., Sec. 9th, vol. 1st, p. 233. Again, has the principal Secretary of State of these realms so much leisure from more important and arduous duties as to effectually supervise what these private individuals, with no official or legal responsibilities, may concoct in the privacy of their closets? If he has not leisure, the work must be handed over to some subordinate governmental official, and such a course would make matters more dangerous still. The Commissioners are Mr. Ffennel, Mr. Eden, and Mr. Leslie. They were nominated in terms of the Salmon Act, 1862 (a statute, by-the-bye, which seems to have been strangely ill framed, as may be seen from Sec. 42 of xxxi. and xxxii. Vic., Cap. 123, worded thus "So much of the xxii. Sec. of the Salmon Fisheries (Scotland) Act 1862, as confers on District Boards the power 'to make and alter from time to time regulations for the preservation of the Fisheries in the District,' and the 25th Section of that Act, are hereby repealed"), and their appointment was renewed, and their powers continued, by the Acts 26 and 27 Vic., Cap. 50; 27 and 28 Vic., Cap. 118, and 28 and 29 Vic., Cap. 119. Was the work speedily done which was assigned them, or was it easy? We may form some notion from these facts. The bye-laws fixing the limits of each district, and the bye-laws fixing the boundary on each river, between upper and lower proprietors were to be issued before the 1st January, 1863 (Sec. 15); and the bye-laws on other matters were to be issued before 1st January, 1864 (Sec 16). The period was extended as regards the latter class of bye-laws till the 1st January, 1866 (26 and 27 Vict. cap. 50, sec 1), and again extended as regards both classes of bye-laws till 1st January, 1866 (27 and 28 Vict. cap. 118, sec. 1); and



again extended as regards both classes of bye-laws till the 1st January, 1867 (28 and 29 Vict., cap. 119.)

As has been already observed, there were a great many amendments of the Salmon Statutes; and now we see a great many extensions of the original periods designed for making bye-laws. In the one it was amend! amend! amend! In the other extend! extend! extend!

The salmon proper being disposed of, along with parr, whitling, and yellow-fin, a few observations may be made on the Legislature's protection of *trout*. There is a statute 8 and 9 Vict., cap. 26, dated 30th June, 1845, which deals with "trout and other fresh water fish." It has its odd points. It is directed against persons fishing with "nets" to catch trout. Section 4th appears as if Hogg, the Ettrick Shepherd, had prepared it. "And be it enacted that it shall be lawful for any person, without any warrant or other authority than this act *brevi manu*, to seize and detain any person who shall be found committing any offence against this Act, and carry such person before the Sheriff, or any Justice of Peace," &c. There is a decided relish, in Scotland, for *brevi manu* work for the Salmon Statute 1868; 31 and 32 Vict., cap. 183, sec. 29 is couched in precisely the same terms. The *carrying* process, however, would not be very easy, it would assuredly procure the carrier more cuffs than half-pence. The Duke of Albany, Brother of King James III. of Scotland, when he and his servant escaped from Edinburgh Castle, undertook a good load, for he hoisted his servant, with a broken leg, on his shoulders, and carried him down to Leith; but few persons would be disposed to carry a poacher of fish in that fashion. Probably before the carrying time arrived both combatants would be

*hors de combat*, as the French say, and, if so, the half of the penalties and forfeitures going to the prosecutor would be dearly earned; or, to use Shepherd Hogg's loveable Latin phrase, it might be "*veecy versha*." It is trusted Mr. Russel will not be "*skunnered*" at the unusual Latin pronunciation. The Shepherd himself was wont "to defie ony man to skunner him frae his denner," especially when the feast was in the celebrated Mr. Ambrose's Inn, in Edinburgh. And in adopting this resolution he showed his good sense. This Act was amended fifteen years after by 28 and 24 Vict., cap. 45, dated 23rd July, 1860. The Preamble bears "Whereas by the Act 8th and 9th Vict. cap. 26, entitled an Act to prevent fishing for trout or other fresh water fish by nets in the rivers and waters in Scotland, provision is made for preventing the destruction of trout and other fresh-water fish by nets in the rivers, waters and lochs in Scotland: And whereas there are various other ways by which trout and other fresh-water fish may be destroyed, which have not yet been declared illegal. Be it therefore enacted, &c." Then comes a specification of the methods of destruction *not hitherto* declared illegal. They are these,—“double rod fishing” or “cross line fishing,” or “set lines” or “other fishing,” or “burning the water” or “by striking the fish with an instrument,” or “by pointing” or “to put into the water lime,” or any other substance destructive to trout or other fresh-water fish, with intent to destroy the same. The fixed penalty is £5 with forfeiture of the instrument and fish. The fish, however, do not seem to have much protection, notwithstanding, from double rods, &c., when used in the hands of *certain favoured classes of men* because of the following

proviso : " Provided that nothing in this Act contained shall prevent any person having the right to fish in any river, water, or loch in Scotland, or any person having permission from such person, from exercising the right of fishing in such river, water, or loch, *in any mode not prohibited by law prior to the passing of this Act.*" (Sec 1.) Moreover, it is well known that thousands of school boys, in the summer season tuck up their trowsers, shirt sleeves, wade along burns, mill-leads, and every other small collection of running streams, and push their hands and arms under banks, and so capture both trout and parr by seizing them with their fingers. Then water spaniels are often taught to search for and seize trout in shallow waters, such as burns and mill-leads, &c. Indeed, the Newfoundland dog appears to have a natural instinct for hunting salmon, as may be seen by turning to pages 24 and 25 of vol. II. of *Cassell's Natural History* and in the *Popular Educator*, issued and printed by the same gentlemen, vol. I., p. 265—edition 1852, a pleasant anecdote is recorded of a spaniel catching salmon for his master's dinner. Again, Mr. C. Stewart, in his new publication, published by Adam and Charles Black, in 1871, entitled *A Caution to Anglers*, does not hesitate to impute the alleged scarcity of trout to the *rapacity of anglers themselves*. See his pages 52, 53, 54, 55 and 56. It is rather curious to find the arbitrary sentiments we have just adverted to indulged in the year 1881 in British Columbia. Let the reader procure the 17th volume of the *Canada Law Journal* for 1881 and turn to p. 198 thereof, and he will find the fishing officer in British Columbia construing the words " convict on view " as justifying him in summarily dealing with a man whom he viewed as a fish poacher by punishing him without a judicial

trial. Redress was sought by the aggrieved party in a superior court. The Lord Chief Justice quashed the whole proceedings, observing that every man was entitled to a fair trial and an opportunity of defending himself. In the year 1882 a prosecution was instituted against five Manchester anglers at the instance of the Trent Fishery Board, in respect they had no licence to fish for trout in the river Wye. See *Times* newspaper of date 24th April, 1882. The bench dismissed the case as against one of the defenders and continued it for three months against the others. Again, the Scottish Fishery Improvement Association, located in Glasgow, entertained, on 18th May, 1882, a complaint from a Mr. John Clark, secretary of the Echaig Angling Club, Glasgow, that several fish dealers there had dozens of small fish for sale which he styled salmon smolts, and the council remitted to a small committee of their number to consider whether said fish dealers should be prosecuted under the Scotch summary Procedure Act. See *Scotshman* newspaper, 19th May, 1882. It is a great pity that the kindly and comprehensive views of Lord Suffield, author of a tract on the Game Laws, published 1825, should not now prevail as regards angling in rivers and smaller streams throughout the United Kingdom. His Lordship's words at page 99 should be attentively read and re-read. Some country gentlemen in England, although preservers of game and having large landed estates, heartily supported his views. One of these in 1815 wrote and published two or three letters, in a pamphlet form, on the subject, which are well worth perusal.

There is a rather favourite topic broached by some salmon proprietors, viz., the blasting of rocks to allow of salmon reaching the upper waters, forgetting the silent abraising

power of water itself, and the danger of too hasty a destruction of the impediments in the bed of the stream, which often prevents floods from being so destructive as they otherwise would be, with an unimpeded channel. Again, an unobstructed flow might ultimately endanger the loch from whence the water comes, by draining it. This does not seem to be a chimerical danger if we look to *Lessons in Geology* by Thomas W. Jenkyns, D.D., F.G.S., to be found in *Cassel's Popular Educator*, ed. 1853, vol. II., pp. 166 and 167. In short, the facilities of breeding salmon would be too dearly purchased by the violent measures proposed, of making a clear passage for them to within, it might be, a few miles of the source of the stream which they frequent. It is not too much to say that the Scotch salmon question has bred a mass of perplexing and contradictory legislative measures—literally making confusion worse confounded. The only effectual remedy appears to be a new, well considered, and comprehensive statute, embodying what is really needful, and repealing all previous Acts of Parliament anent salmon and salmon fishing. That salmon can thrive in their natural state, in *pure water*, in spite of all the nursing they get in Scotland, appears pretty plain from what occurred in 1824, in the river Bann, near Coleraine, Ireland, where 750 salmon were taken in one day, and again, in the same river, in 1834, 1500 salmon were taken at a haul.

The prominent points, in the foregoing pages, relative to parr, may be here summarised under the following heads.

1. There are the general authorities quoted from *Cassel's Natural History*, a new work showing that persons well qualified to judge have pronounced parr to be a distinct

and different species of fish from the young of the *salmo salar*. 2. There is the evidence, on oath, of John Bayne, builder, Dunblane, an angler of 30 or 35 years' experience, swearing he "has found parr during the whole season;" that "the parr is not of the same make as the grilse; the parr is larger in the head;" that he "has found roe in the female and milt in the male;" that "the smolt's head is longer than the parr's, its mouth is much more tender than the parr's;" with much more to be found in his deposition. James Brown, gardener, Dunblane, an angler of forty-eight years' experience, swears—"I have ripped up both parr and smolt. I have found milt and roe in the parr;" that "a parr is neither trout nor salmon." David Ferguson, Doune, an angler of fifty years' experience, swears "The parrs are plenty in all seasons." David Bayne, joiner, Dunblane, an angler of twenty years' experience, swears—"I have killed parr in the Allan with milt and roe in them," that "I caught two female parrs to-day, and found roe in them." John Mc.Laren, fishmonger, Auchterarder, swears—"I have been a fisher since I was able to fish;" that "I have found parr in the Rannoch in abundance, the same as I have found in the Teith, and I found plenty of them in all the streams thereabout. I have seen smolt often, but they are not like these." James King, watchman on the Allan, an Angler of thirty years' experience—"I think the parr is a different species from the smolt: the fins of the smolt are blue, the parr's yellow." Thomas Allan, residing in Stirling, swears—"I know parr from smolt when I see them. I remember my brother and a young man bringing home three smolts and two parrs, and putting them into a spring well, where they could not get out. The smolts grew rapidly and died in

about six weeks. The parrs grew very little in six months. The parrs were lifted out into a bucket when cleaning the well." John Hunt, Dunblane—"Know Bruces well. I got two parrs from the Allan and put them in it. One of them remained there five years. I watched all these five years, and it remained a parr all the time." Peter Speedie confirms this. James Anderson, Dunblane, an angler of forty years' experience, knows parr; "have examined parr and found roe and milt in them." James Wingate Johnstone, Deputy Inspector of Hospitals, and presently residing at Bridge of Allan, swears—"I am a physician. I, along with Dr. Paterson, made an anatomical examination of two grilse and three parrs—a male and female grilse, and one of each sex of the parr. The spinal column of each grilse had 56 vertebræ; the parrs had 59. The bones were fully developed in both species. They appeared to be different fish decidedly. The milt in the grilse was well expressed; as also in the parr—not to the same extent. I considered the parr as fully arrived at maturity, as they had organs fit for producing," and much more to be found in the deposition itself. Dr. Paterson, Bridge of Allan, confirms Dr. Johnstone, and in answer to the presiding judge said—"The parr's head is more of a bull head than the smolt's, and is also different from the head of the grilse. It is against all rule of nature that this difference would ever disappear," and much more to be found in the deposition itself. 8. There were, by the testimony of Peter Marshall, no sufficient safeguards at the Stormontfield Ponds to prevent pure parr and trout of all sorts being put, or allowed to get, into it, and breeding therein; and in his examination in 1870, he discloses the important fact that the Pond was liable to be

flooded by the river occasionally ; moreover, the pond was not in a satisfactory state, even by Mr. Buist's testimony, until 1866, when he got, what he calls, a "lying-in hospital," and other works erected under the superintendence of Mr. Ritchie, civil engineer (See p. 13 of *The Stormontfield Piscicultural Experiments* in 1853, published in 1866 by Robert Buist.) 4. Mr. Yarrel in his book, vol. 2, p. 46, uses these words in connection with the parr : " In the markings they are so distinct as to be at once separated from trout by any observer. The row of blue marks which is also found in young trout and the young of several of the salmonidæ, in the parr are narrower and more lengthened. The general spotting seldom extends below the lateral line, and the two dark spots on the gill cover are a very constant mark. On a still closer comparison between the young trout and the parr of smaller size, the following distinctions present themselves : the parr is altogether more delicately formed, the nose is blunter, and the tail more forked ; but the chief external distinction is in the immense comparative power of the pectoral fin. It is larger, much more muscular, and nearly one third broader ; and we at once see the necessity for this great power when we consider that they serve to assist in almost constantly suspending this little fish in the most rapid streams. The scales of the parr, taken from the lateral line below the dorsal fin, were altogether larger ; the length greater by nearly one third ; the furrowing more delicate, and the form of the canal not so apparent or so strongly marked towards the basal end of the skull." 5. Dr. Heysham, of Carlisle, in 1826, appears to have made a minute anatomical examination of the parr, similar in many respects to Dr. James Wingate Johnstone's and Dr. Paterson's



in the year 1853. The words used by him are,—“ The *opercule* forming the outer edge of the gill cover is much more round than in the trout—approaching in this respect to the salmon. In the trout, the lower angle is decidedly angular. The *inter opercule* in the parr is longer and narrower. The *maxillary* bone is broader at the posterior corner, but much shorter in the parr. The *vomer* is much weaker. The bones or rays of the gill cover are longer, and much narrower than those of the trout. The teething of the parr is weaker. The bones of the tongue longer, weaker, and not so broad, and the under jaw much weaker, and the distance between its *rami* in the parr about one-third less.” Doctor Heysham states that he took the names of the bones from the osteological work of Cuvier. 6. Sir William Jardine distinctly states that the parr has no connection whatever with the migratory salmon, and adds, “ I have no hesitation in considering the parr, not only a distinct, but one of the best and most consistently marked species we have, and that it ought to remain in our system as the *salmo samulus* of Ray. He gives information also, for the easiest way of distinguishing, to persons who have not inclination and leisure to dissect them—(1.) The great size of the pectoral fin ; (2.) the shortness of the maxillary bone, and consequently the diminutive gap compared with the same sized trout, and the breadth between the *rami* of the lower jaw. The Duchess and Countess of Sutherland permitted Sir William, Mr. Selby, Dr. Greville, Mr. James Wilson, and Mr. John Jardine, Sir William’s Brother, to make a complete examination of her ladyship’s fishing streams, and the substance of the examination, so far as the parr and salmon are concerned, is given above.

Any one desirous may read a paper of Sir William Jardine's in the *Edinburgh Philosophical Society's Transactions* for January, 1835. 7. Parr is a deadly lure for large trout, and is so recommended by Mr. Stoddart, Mr. Scrope, Mr. Russel, Mr. Stewart, and other writers on Angling.

The question really at issue is not one of killing parr, but simply what select coterie of private individuals shall have a statutory right to kill them to increase their own amusement, sport, and profit, to the entire exclusion of the community at large, and particularly those humble members of it to whom a few small fish for dinner, or even breakfast (as the Ettrick Shepherd used them) would be most acceptable. Mr. Bertram, Edinburgh (editor of the *North Britain* newspaper), who on the 18th October, 1865, published a book entitled "The Harvest of the Sea," is very wary when he deals with parr; he eschews the name parr for baiting the hook, and in its stead uses "little trout." He is, besides, rather misty at p. 183 of his book, when speaking of "a very eminent naturalist," who held certain opinions about parr at "one time," implying thereby that he *now* holds different views; but he does not venture to say that in so many words. He might, however, have been more simple, and just have told his readers that the eminent naturalist was Sir William Jardine, which is the fact, and that that gentleman has not changed his opinion, at least Mr. Bertram has given no evidence of it; it suits him better to ride in the same coach with Mr. Buist and Mr. Hogg, the latter of whom, by Mr. Bertram's story, "suspected *all his life* parr were salmon" (p. 184), although Mr. Scrope *converted* Mr. Hogg from parr to salmon. Probably Mr. Hogg was, before his conversion, one of the "few wrong-headed people"

(p. 187) whom Mr. Bertram had in his eye. A more enlightened man is Mr. Marshall, with whom Mr. Bertram "compared notes" on the parr question (p. 195). In short, Mr. Bertram thinks "the root of the evil as regards the scarcity of salmon is to be found in the *avarice* of the lessees of fisheries who have overfished the rivers to an alarming extent" (p. 200). Then Mr. Bertram lauds Mr. Buist beyond measure "for accurate experiments conducted under his own superintendence," yet we have Mr. Buist himself relating things contradictory of this laudation. "When," writes Mr. Buist, "the strong instinct comes on them" (*i.e.*, smolts) "for departure from the pond, they seemed to be seized with an extraordinary impulse, and *from what the keeper states*, they muster in divisions, which go off daily. They first swim round the pond and then dart over the edge of it into the trough which leads to the river." (*Stormontfield Experiments*, p. 19.) One would think the *superintendence* here described leading to such knowledge was *not* Mr. Buist's, but the *keeper's*. Again writes Mr. Buist, "As soon, therefore, as the *keeper thought* the new pond ready he ran the parrs into it; but unfortunately it turned out that this was done rather prematurely, the embankment not being then properly consolidated" (pp. 11 and 12). Where were Mr. Buist's accurate *personal* experiments in all this? At p. 182 of Mr. Bertram's book he firmly sticks to his parr theory. "It is curious that although the fish " (parr) "was declared over and over again to be a separate species, no one ever found a female parr containing roe." It is equally *curious* he never heard of the Dunblane case, and the proof there led, which happened in the year 1858; while, as already recorded, Mr.

Bertram's book was issued in 1865-8. We now come to notice particularly Mr. Anderson's letter, quoted at length in a previous page (p. 112). The worth of that document depends on several circumstances, the authenticity of which are not apparent in themselves; and so far as appears, no steps to establish their authenticity were ever taken. The writer assumes that the Stormontfield Pond was, as it were, hermetically sealed to all but Mr. Buist, the superintendent, and Mr. Marshall, the keeper. It also assumes it was perfect in its construction, and kept so. So far from this, Mr. Buist himself, in 1866, writes that "the old breeding boxes formed in 1853 having become totally rotten have now been removed, and an entirely new set, on an improved plan, and of a more durable wood, erected under the able superintendence of Mr. Ritchie, civil engineer (pp. 12 and 13). What benefits accrued from that? Mr. Buist himself shall answer the question. He writes, "Thus mud, the seeds of other fish, and of insects, are prevented from getting into where the salmon eggs are deposited, or to the fry after they are hatched" (p. 13). Surely the natural conclusion to be drawn from these words is that the seeds of other fish, insects, &c., gained admission to the *old* pond. But besides this there are some curious additions to be made. Mr. Marshall, the keeper, in his examination on oath, in July, 1870, distinctly swore he had a *pike*, *yellow trout*, and *minnow* in the Stormontfield pond. Not only so, but he swore also that *the river Tay sometimes overflowed into the pond*. The yellow trout is a perfect gormondizer of salmon fry, a fact Mr. Buist himself relates, so that it was very inconsistent in the keeper, Mr. Marshall, to allow such a tenant to partake of "boiled liver, rubbed small." Mr.

Anderson's words to the *Field* are to the effect that he sends "some salmon parr which had not put on the smolt dress." Where is the evidence to be found that the fish so sent were "salmon parr?" More likely from the experimental results, they were true parr, trout or trout parr. But Mr. Anderson, in a jubilant mood, writes, "I think this is the first well authenticated case of fish, that were beyond possibility of doubt 'salmon parr,' being kept confined to fresh water for *six* years." He is like a man who runs before his horse to market. Where is the proof of "the first well authenticated case"? There is no genuineness in the matter at all, which is the thing complained of. There is no proof even that the said fish, whatever may have been their species, were confined six years in a pond. But, for the sake of argument, it shall be assumed that that particular fish sent to the editor of the *Field* newspaper had been confined six years in fresh water, how is it reconcileable with the following fact related by Mr. Buist in his work (p. 20):—"It has been found that (a salmon parr) if kept in a pond whence there was no egress, the smolts would throw themselves out of the water and die on the banks." If Mr. Anderson's fish had really been "salmon parr," then in the course of time and nature they became "smolts," but the strange part of the story is that the fish he experimented with never became smolts at all—at least not the one sent to the editor of the *Field*. If, too, they had become "smolts," they would before the end of so long a period as six years have thrown themselves out of the water, and died on the banks of their place of confinement, "seized with an extraordinary impulse" like that described by Mr. Marshall to Mr. Buist. Then we have the testimony of a

man on oath in a law court that he saw three smolts and two parrs put into a spring well, where the smolts, after growing rapidly, died in about six weeks, while it was sworn to that one of the parrs lived five years in the well. The fair conclusion from all these things is that the editor of the *Field* had received pure parr, or trout, or trout parr. Fortunately Mr. Francis, instead of cooking and eating the fish, as desired, added a *notandum* which bears no reference to the fish being salmon parr, or exhibiting any exterior tokens of a smolt. He does not commit himself either by saying that in his opinion it is a specimen of the true young of the *salmo salar*. He studiously avoids describing the species, and uses the generical term fish. He put it in spirits, and left it at the *Field* office.

If it might be possible to tinge the minds of the legislators of the present day with the feelings and sentiments of one of former times, no doubt on a different subject, there might arise some hopes of oil being thrown on the troubled waters of fish life. Burke, when discussing the question of a legislative power to impose taxes, spoke, *inter alia*, as follows :—  
 “I do not examine whether the giving away a man’s money be a power excepted and reserved out of the general trust of government ; and how far all mankind, in all forms of polity, are entitled to an exercise of that right by the charter of nature. Or whether, on the contrary, a right of taxation is necessarily involved in the general principles of legislation and inseparable from the ordinary supreme power. These are deep questions, where great names militate against each other ; where reason is perplexed ; and an appeal to authorities only thickens the confusion, for high and reverend authorities lift up their heads on both sides ; and there is

no sure footing in the middle. This point is the *great Serbonian bog, betwixt Damietta and Mount Casius old, where armies whole have sunk*. I do not intend to be overwhelmed in that bog, though in such respectable company. The question with me is, not whether you have a right to render your people miserable, but whether it is not your interest to make them happy. It is not what a lawyer tells me I *may* do, but what humanity, reason, and justice tell me I ought to do. Is a politic measure the worse for being a generous one? Is no concession proper but that which is made from your want of right to keep what you grant? Or does it lessen the grace and dignity of relaxing in the exercise of an odious claim, because you have your evidence room full of titles, and your magazines stuffed with arms to enforce them? What signify all those titles and all those arms? Of what avail are they when the reason of the thing tells me that the assertion of my title is the loss of my suit; and that I could do nothing but wound myself by the use of my own weapons?"

There is not one word said in this publication, or meant to be said, either in jest or earnest, against the fair and proper pursuit of legitimate pisciculture; it is illegitimate pisciculture, loaded with all sorts of mephitical excrescences, which provokes adverse commentary. Nor is there the slightest disposition to encourage or justify any illegal measures in fishing. It is, however, an undoubted truth, that one extreme begets another. There has been arbitrary, unwise, and indiscriminate classification of fish, and unwise and harsh measures of repression, and these in turn breed recklessness and violence in the acts of certain portions of the population, who conceive they have been needlessly

deprived of an harmless amusement in fishing for parr. When the first edition of this work was passing through the press, in July, 1871, a complaint against a boy of 15 or 16 years of age, at the instance of Mr. Napier, superintendent of the Forth Salmon Fishings, charging him, before the Sheriff of Dunblane, with taking *one* parr from the Teith on 24th June, was disposed of. The boy had been angling for amusement and recreation. While the learned sheriff felt himself constrained to convict under the statute, he expressed regret that he should have had to do so. The boy was fined one shilling, and subjected in ten shillings of expenses, failing payment of which three days' imprisonment; and his rod and tackle were declared forfeited. A similar case, it is said, occurred in 1866 to a young boy of 11 or 12 years of age, son of a lawyer in Edinburgh, who, being in the neighbourhood of Kelso, was amusing himself fishing in a stream in that locality, and having caught a parr, he was laid hold of, his rod and tackle seized, himself prosecuted in court, and fined, &c. He was an invalid, and had need of healthful recreation instead of being molested and frightened. In this present year 1880 there appeared the following paragraph in the *Scotsman* of Wednesday, 10th Nov., 1880:—"At a Quarter Sessions, held at Dumfries, on 9th November, 1880, Mr. Villiers, of Closeburn, who presided, said that when the punishment of juvenile offenders was engaging the earnest attention of the Home Secretary, and exciting great interest throughout the kingdom, he thought it would be an opportune moment to draw the attention of Sir William Harcourt to the Solway Fishery Act, and he gave notice that at next statutory meeting of Quarter Sessions a memorial be presented to the



Home Secretary, calling his attention to the stringency of the Act, and suggesting that a discretionary power should be given to Justices of the Peace to modify the fines and costs in the case of young persons. At present they must impose a fine of £5 and costs on a boy for catching a parr. Mr. Barker : " We have often felt the hardship of the Act in such a case." It would be well for Great Britain and Ireland if there were more comprehensive views cultivated by the mass of the middle ranks of the people on what may be called social questions, and a more frequent imitation of the beneficent acts of the various members of the present Royal Family towards the less fortunate individuals who form a large part of the community of the United Kingdom. On this subject, reference may be made to a public meeting at the Mansion House, London, in May, 1881, having for its object " Charity Organization," at which meeting Prince Leopold, during the course of his speech, used these forcible words, " Light, air, green fields, and pure water are the first and most essentials of pleasure and what we should try hardest to secure in some measure for everybody." [*Times*, Thursday, 5th May, 1881.]

Nature, the beauties of nature, and the strength of nature, are all, in these days, overshadowed by the alleged superiority of human wisdom, which wisdom exhibits itself by the whirring of machinery, the belching out of dense black clouds of smoke from the manufacturing chimney stalks towering to the skies ; as well as the extensive pollution of the rivers, burns, and other running streams, in the United Kingdom, which waters nature intended for the benefit of the human race and of the animal creation. Mr. Buist's sentiments on the subject of rivers, &c., are not doubtful, as

the following words of his prove :—" To leave everything to the operations of nature, as some philosophers contend, is just about as reasonable as to say that we ought to leave our fields to sow themselves. Such a doctrine is utterly unworthy of these days of stupendous progress in science and art " (p. 7.) \* \* \* " It is, I must repeat, a most absurd thing to say that nature should be left to herself as regards the rivers. I was not a little astonished to find the learned Dr. Gray propounding such a doctrine at the late meeting of the British Association in Bristol." (p. 15.) Mr. Buist's astonishment should have speedily come to an end if he had only but remembered that these are the days of extensive adulteration of food, drink, drugs, seed, raiment, and the use of false weights and measures, in spite of Acts of Parliament, besides many other social evils of great magnitude, running side by side with " these days of stupendous progress in Science and Arts." (*Edinburgh Journal of Jurisprudence*, vol. 23, p. 53. *Fun*, the London Journal for January, 1871. *Times*, 25th November, 1881).

There is here quoted a letter of His Royal Highness the Prince of Wales to the late Earl of Beaconsfield, which shows that it would be wise to have the various rivers and rivulets of the United Kingdom purified and kept pure.

"24th March, 1879.

"MY LORD,—As President of the Society of Arts, I have the honour to transmit to your Lordship the enclosed copy of resolutions which were passed at a Conference held by the Society in May, 1878, on the subject of a national water supply. The Conference was held in consequence of a suggestion of my own to the Council, and it was attended by many of the most influential authorities on this subject in the country.

"I need not urge upon your Lordship the necessity for providing a supply of pure water to the population of this country at the present time. Our great cities are endeavouring, each for itself, to

secure a sufficient supply, while the small country towns and villages are dependent solely upon accidental sources.

"Should Her Majesty's Government be able to accede to the wishes of the Conference, by appointing a Commission, such as that suggested, the first duty of the Commission would probably be to collect information. They would then be in a position to take measures for establishing such an organisation as might insure that the existing abundant supply of water should be dealt with in such a manner as to secure a regular provision both in towns and country districts of this first necessity of health and comfort.

"The feeling of the Conference was that it would be better simply to urge upon Government the appointment of such a Commission, without endeavouring to suggest the means which might be employed, after sufficient information was collected, to remedy the present state of things.

"The growing importance of the question it would be difficult to over-rate, nor can it be successfully dealt with except by the authority of Government. The Society of Arts have already drawn special attention to it, and will continue their endeavours to promote its public discussion, but beyond this it is obvious they can no further go. I have the honour to be

"Your Lordship's obedient Servant,  
"ALBERT EDWARD P."

"Downing-street, Whitehall, March 31st, 1879.

"SIR,—I have the honour to acknowledge the receipt of your Royal Highness's letter of the 24th inst., forwarding copy of the resolutions passed at the Conference, on a national water supply, held at the Society of Arts, in May, 1878, and I have to inform your Royal Highness that I have referred the matter to the Board of Treasury for the careful consideration of their Lordships.

"I have the honour to be, Sir,  
"Your Royal Highness's obedient servant,  
"BEACONSFIELD."

How little purity of rivers are appreciated by some towns may be seen from the case of Wallingford-on-Thames. [*Times*, 21st July, 1881.]

Before breeding ponds were invented there were large salmon, as well as large-hearted and generous anglers, as the following examples prove. Doctor Nowell, Dean of

St. Paul's, was a great and keen angler, and usually bestowed most of his fish amongst the poor who inhabited near to those rivers in which the fish were caught. In a London journal, dated 16th April, 1789, it is said the largest salmon ever caught was yesterday brought to London. This extraordinary fish measured upwards of 4 feet from the point of the nose to the extremity of the tail, and 8 feet round the thickest part of the body. Its weight was 70lbs., within a few ounces. Another instance of the same sort occurred with a Mr. Groves, fishmonger, Bond-street, London, who, in 1821, had in his shop a salmon which weighed 88lbs. [See also *Times*, 10th November, 1870.] Such examples as these well justify Dr. Gray's confidence *in the efficacy of nature*, as well as the desire of all reasonable persons, to have our rivers and rivulets freed and kept free of noxious materials. Let every river, running stream, loch, and pond in the three kingdoms be well stocked with all kinds of fish, but let the proprietors thereof extend their benevolence to their poorer brethren by allowing them to fish in rivers and rivulets, to provide a frugal meal for, it may be, a large family of young children. This is written, however, under the proviso that those indigent persons do not abuse the privilege granted, by directly, or indirectly, poaching; or being guilty of direct or indirect trespassing on and over private property, and in short that they strictly conform their behaviour to the rules which may accompany the privilege conceded to them.

The principles and reasons of modern philosophy appear sometimes in the present day in a strange form. Turn to Mr. Holyoake's article, in 1878, in the *Nineteenth Century Magazine* of that year, p. 588, on Co-operation as a principle of

trade, where he introduces the following passage :—" Had Christ foreseen the melancholy controversies over what he meant which have since saddened the world he would have written a book himself, and never have trusted the condition of salvation to the incapable construction and vague memories of an illiterate crowd." From this it is highly probable that Mr. Holyoake would undertake at a glance to answer in his rattling style all the questions in the 38th chapter of Job. If so versatile a gentleman was to read Dr. William Sherlock's work, entitled " On a Future State," and Dr. Thomas Sherlock's Discourse on the Text, cap. vi., verses 67, 68, and 69 of St. John and George Lord Lyttleton, work alluded to in the preface, he might become a little more humble minded as to what Christ foresaw, and as to the extent human knowledge and reason, in Divine things, can reach. The present Archbishop of Canterbury's (Tait) charge to his clergy, at Maidstone, on 27th September, 1880, was not a moment too soon. His Grace, alluding then to the education of the poorer classes of the population, used these words :—" For the less refined it must be remembered unprincipled men have provided in this age a complete deluge of immoral and debasing literature, which will sweep away all the pure instruction they have received in childhood, if some friend be not at hand to direct them." In Sir Edward Coke's days the following incident occurred, which is highly illustrative of the respect in which religion was held by the then existing Parliament of England. A Mr. Shepperd, in his place in Parliament, as one of its members, ventured to ridicule a bill which was titled " An Act for Keeping of the Sabbath." He was first ordered to withdraw from the House, and after discussion among the members, in which

Sir William Cope, Sir Edward Coke, Mr. Thomas Crewe, Sir Henry Anderson, and Sir Thomas Hobby, took part, he was called to the bar, and there on his knees he heard his sentence, viz., "That the House doth remove him from the service of this House as being unworthy to be a member thereof." (Proceedings and Debates of the House of Commons from 1620 to 1621, 2 vols., printed at Clarendon Press, Oxford, in 1766, vol. 1st, pp. 45 and 53.)

There have been likewise modern statesmen, in this country, with minds imbued with much reverence for the power of Divine Providence; an example whereof may be seen in a letter by Sir James Graham to Sir Robert Peel, of date 18th October, 1845, at the period of the failure of the potato crop in Great Britain and Ireland. "It is awful," writes Sir James, "to observe how the Almighty humbles the pride of nations," and on the same occasion Lord Kenyon, in a letter to Sir Robert Peel, uses these words: "Lord Kenyon takes the liberty of suggesting a special public acknowledgement of our dependence upon God's mercy." (Sir Robert Peel's memoirs, edited by his executors, Lord Mahon—now Lord Stanhope—and the Right Hon. Edward Cardwell, M.P., 2 vols.—volume 2, p. 125).

It was not only the fish which formed so fruitful a source of litigation, but the Regulations or Bye-Laws of the Scotch Salmon Commissioners contributed their quota to swell the grievances, as the following under-noted topics will illustrate. We have "*Close time*," Jopp, 28th April, 1863, 4 Irwine's Justiciary Reports, p. 365; *Blair v. Shepperd*, November, 1870, Journal Jurisprudence, June, 1871. Harvey, 6th September, 1869, 1 Couper's Justiciary Reports, 335. "*Tweed Acts*," Rose, 19th September, 1865, 5 Irvine,

198, "*Bye-Laws*," and "*Public right to fish with Rod and Line*." Tay Commissioners, 2nd April, 1866, 5 Irvine, 224; Anderson, 25th November, 1867, 40 Scotch Jurist, 87, "*Bag Nets*" on Tweed, Johnstone, 25th May, 1868, 1 Couper's Rep. 51, and 40 Jurist, 512, "*Immediate Imprisonment*," Mc.Dowell, 7th March, 1868; 1 Couper, 9, "*Oath of one Witness*;" Jopp, 15th April, 1869, 1 Couper, 240, "*Quashing Conviction*." Mc.Allan, 24th May, 1869, 41 Jurist 604, and 1 Couper, 307. "*Mill Hecks*;" Blair v. Sandeman and ditto against Lumsden, 16th July, 1869; 1st Couper, 309, Kennedy v. Murray, 8th July, 1869, 41, Jurist, 560. This may be called a leading case on mill dams and their construction, and the powers vested in said Commissioners to have their orders obeyed by mill owners, &c. There are, however, two other subjects, relative to Scotch Salmon Fishery, not devoid of interest at this particular juncture, viz., "*Obsolete Statutes*" and "*Slavery*." In the year 1793 there was an attempt on the part of the then Procurator-Fiscal of the Town of Stirling to put into operation an old obsolete Salmon Statute against some poor men in the neighbourhood of Stirling, but which failed. The Pror. Fiscal of Stirling v. John Gillies and others, 20th November, 1793, Faculty Coll. Reports, vol. 10, p. 159. And again there was an attempt in the year 1696 to make fishermen slaves, which likewise failed; Reid Beverly, &c., against the Laird of Woodney, &c., 31st July, 1696; Morrison's Reports, 4427. The Lords of Session, of that era, found the Laird's proceedings *corruptela*.

## APPENDIX.

## ARE PARR YOUNG SALMON ONLY.

SIR,—I carefully read the leading article in the *Courant* of 12th inst. on this rather interesting question, as also your more recent observations on the point, all of which have been elicited by and bore special reference to the case decided the other day by Sheriff Barclay, of Perth. I also noticed the letter of "E. H." on the subject in your issue of 20th inst., and the explanatory note appended thereto, but which I observe lacks the impression of your official initials, and so I presume is to be regarded as rather the opinion of the writer in, than that of the editor of, the *Courant*.

I do not desire at present to enter upon any lengthened discussion of the subject, but, as one who has paid some attention to this parr question for many years, wish merely to say that, based on personal observation, I hold an opinion different to some extent from that of the writer in your columns. He maintains, and in what seems rather decided terms, that *parr* are the young of the salmon only; others hold that parr never become salmon, but are a distinct species of small fish. The belief I personally entertain on the matter, and which, I think, solves the whole difficulty is *medio tutissimus ibis*; that the young of salmon in their different stages of growth are known by the names of fry, then parr, smolt, and grilse; that the young of the sea trout, of the bull trout, and others are also called parr; and that there is, besides, a species of small trout known by that name. This opinion, I venture to say, is fully borne out by the evidence led in the recent Perth case. In some rivers, when low during autumn, scarce anything may be caught but the small fish called parr. The most of those so caught will, I am bold to say, be found on careful examination to be the parr trout. I have with my own hands, year after year, in order to test the parr question to my own satisfaction, opened and cleaned dozens of the small fish so named, and found them to contain melt or roe, and that fully developed in most of them, even in



very small ones of four and five inches in length. That species of trout attains to six or eight inches at most in length, and that they are called parr in the districts where they abound is, I believe, undoubted. Many of those parrs are very silvery in the scales, and nearly resemble the salmon smolt in appearance, but, unlike the latter in their habits, do not generally lie in shoals, and are not so great a nuisance to the trout angler, either in April or May, or at any other time. Now, will any one maintain that in the true salmon parr, or even in its older stage as a smolt, fully developed melt or roe is natural, or has ever been found? I presume not. Among these parrs I have occasionally observed what I thought a true salmon or sea trout parr, from the shape of the head, the colour of the fins, the want of melt or roe and otherwise, but as to these I have never been thoroughly satisfied, and, if called on, would be very chary in giving any decided opinion regarding them, because of the great resemblance which the different kinds of parr bear to one another.

The issue for trial in the Perth case was just the question, Were the nine fish, or any of them, found in the possession of the accused in the end of June, 1869, the fry or parr of salmon? And Sheriff Barclay, in finding it not proved that they were so, humbly seems to me to have arrived at a just decision on the case as presented to him on the evidence. When even Mr. Peter Marshall would say that in his opinion only five out of the nine fish labelled were salmon parr, and when others gave contrary evidence and expressed a belief that they were not salmon parr, but rather parr trout, the learned Sheriff could not well have decided otherwise than he did. The note to the learned judge's interlocutor shows that though no fisher himself, as he candidly tells us, he yet clearly apprehended, as was to be expected, the real question failing to be decided under the complaint, and to the particular charge in which alone the remit by the Justiciary Court had of course special reference. The evidence conclusively showed that there are other parr than salmon parr; and besides the Perth and Dunblane worthies referred to by you, I am satisfied you will find innumerable others who hold that opinion. It will not do, therefore, as has been suggested, to include all parr in any forthcoming salmon statute. The reference to parr in any criminal statute ought, for the reasons I have adduced, to be limited to the fry or parr of salmon and sea-trout merely, and not to parr in general.

Edinburgh,

22nd July, 1870.

I am, &c.

ANDREW WILSON.

*Addendum*, October, 1882. — The above letter having been brought under my notice by Mr. Flowerdew, I have, at his suggestion, pleasure in stating that every year since it was written, I have caught many parr (trout) from four to six inches in length, some of them having the bars beautifully marked, and their scales as clear and sparkling as those of a salmon smolt, but their colour otherwise not quite so blue, and on opening them I have found almost all of them, even the smallest, charged with either melt or roe, but most of them I think with melt, thus fully corroborating what I wrote twelve years ago. I have no note, nor do I remember, of ever finding either melt or roe developed in any of the young salmon smolt, which I have caught in spring, and these, although of equal size as, or even larger than, the parr (trout) have always been more tender, and have had the appearance of having been far more rapid in their growth than the latter. My opinion, therefore, up to the present time remains the same that the smolts or young of the salmon (and sea trout) develop in their natural element, that is, in a running stream, as distinguished from an artificial tank or pond, far more quickly than many artificial breeders of them are willing to admit. Indeed, smolts, or young of salmon, are so rapid in their growth that after going down to the sea in spring they will return in three or four months afterwards as beautiful grilse several pounds in weight.

But the parr (trout) never grow that weight and never go to sea,  
And hence classing them with the smolt is an absurdity.

A. W.

B. of S. Edinburgh, 16th October, 1882.

“G. R.” writes in *Land and Water* in June, 1872.—

The game laws do not perhaps represent the perfection of human wisdom, as evidenced by human legislation, nor is their operation at all times satisfactory; but they possess this merit—they are not only clear as to their meaning and intent, but equally so as to their objects. When Hodge is brought before the bench for wiring a hare, or stealing a hatful of pheasant's eggs, no plea is placed on record that the animal in question was a polecat or a hedgehog; no scientific witnesses are brought up to prove that the eggs are those of the jay or the pie. In this element of certainty the game laws are immeasurably in advance of the salmon laws, which, complicated and uncertain as they are, become ten times more so by the difference of opinion which exists as to the identity of the objects to which they are intended to apply. This result is

attributable to the deficient amount of special knowledge possessed by the framers of the Acts. The game laws were made by men who, if prejudiced, as possibly they may have been, knew perfectly well what they were doing; were intimately acquainted with the natural history and requirements of the birds and animals they sought to protect, and who took the most direct mode of doing so. This, unfortunately, is not the case with reference to fish. Acts have been passed, as a rule, by persons honestly desirous of protecting and increasing the supply of fish, but insufficiently acquainted with the natural history and requirements of their *protégés*; and a vast amount of litigation, and we fear of public loss, has been the result. Recently in the columns of *Land and Water* a discussion arose as to the real distinction between a kelt and a salmon; and Mr. Buckland propounded a scientific diagnosis which, although undeniably accurate, was for all *practical* purposes valueless. A fisherman can hardly be expected to furnish himself with dissecting instruments, or to learn how to use them, without which the tests suggested could not be applied. In a letter you were good enough to insert of my own, though asserting the impossibility of any experienced person mistaking a kelt for a clean fish, I admitted that the term "experienced" could be properly applied to very few indeed, and that the vast majority of anglers, as well as dealers and consumers, were utterly in the dark with reference to their distinctive marks. A similar controversy arose with respect to the "kipper grilse;" and the fight over the identity of the little fish known as the parr with the young salmon, and which in "The Autobiography of Salmon Salar," I attribute to the bestowing the same name upon two fish, still rages with undiminished acerbity whenever the question is raised. I venture to press my often-recorded conviction that the only mode of meeting the justice of the case, and satisfying those affected by the salmon laws, is by making them, with reference to their object, uniform and unmistakeable, and to draw a hard and fast line both as to the period of protection and the fish to be protected. The angling laws with reference to salmon and trout should be analogous to those in force for the protection of their coarser brethren in the Thames. No fish of the genus *Salmo*—that is, no fish possessed of an adipose fin—should be permitted to be taken from such a time to such a time, varying according to the requirements of the rivers. Within those limits let the capture and the destruction, or the setting free of the captured, rest with the rod-fisher. The only restriction I would insist upon would be in favour of baggits after,

say, the middle of September, there could be no mistake with reference to *them*.

The above was written before the report of the great "yellow fin" case reached me. There could hardly have been a stronger exemplification of the truth of my theory, or a stronger argument, for the course I advocated. The case simply resolves itself into one of disputed identity, where, in fact, setting scientific evidence aside, it is simply impossible that dispute could have arisen. I agree with Mr. Stoddart; there is not, in my opinion, a doubt but that the "yellow fin," the young of the bull or sea-trout, assumes the silvery scale, and follows the smolts to the sea. This fish, noble lords, aided by scientific gentlemen and keepers (give a keeper his way, whether his way be on land or water, and he will destroy every created thing, excepting the objects of his own care), have banded themselves together to extirpate in the Coquet, and some other rivers, in the hope that the true salmon may take their place. I do not believe it will; but whether or not, it is a strange and startling state of things to find a respectable and respected country clergyman hauled up before the magistrates of his country as a malefactor, baited by counsel for a fortnight, subjected to heavy penalties and heavy costs, for having, probably by accident or in mistake, killed half-a-dozen infant specimens of the fish, which, a few miles off, are harried, hunted, destroyed on their spawning beds, and treated altogether as worthless, nay, mischievous vermin. The fact of the possession of these "yellow fins" is admitted. The question is, do they come under the definition of "migratory fish," over which, whatever their state or condition, the law has spread heregis? I repeat that, in my opinion, there is no doubt of this. The "yellow fin" *does* assume the silvery scale; it *does* descend to the sea in the spring, and returns the following autumn a bull or sea-trout, and a very excellent and valuable fish he is; but the scientific evidence adduced, abounding in hardest words and terms of art—"phylorics, vertebræ, vomerine teeth, rays, operculum, sub-operculum"—heathenish epithets, which "no fellar" can be expected to understand—almost shakes my belief. What is the value of scientific testimony when a gentleman called as a witness for the prosecution—Dr. Young—expressly to prove the identity of the captured fish, declares upon oath, after a lengthened private examination, that two specimens examined by him are the young of *Salmo salar* and *Salmo trutta* respectively, and that one at least had been down to the sea; whereas it appeared that they were both "Loch Leven" trout, which are not migratory fish at all, the lake having no communication with the sea? The fact is, that the Legislature, in its praiseworthy anxiety to preserve and increase the

*Salmonidæ*, and in utter ignorance of how to do it, has laid traps for the unwary, into which the reverend defendant has fallen. All young *Felidæ* are barred; all young *Salmonidæ* are barred. Mr. Bartlett, Mr. Buckland, and a few more may know the difference between young tigers, young lions, and young pumas, but we, the public, do not. Practical fishermen know the difference between young trout, young salmon, and young bull-trout; the public do not, and never will. It is equally absurd and mischievous to make it penal to take any or either with the fly. The numbers thus killed are, in proportion to those hatched, and to those destroyed by natural means, infinitesimal, and enemies to the race are made of those who would otherwise be their friends and protectors. I saw in the *Field* one day last year a wonderful calculation of the awful damage done by the destruction of the smolts by anglers. Given, so many rods fishing so many days, product, so many smolts taken, result, so many salmon the less. This is palpable nonsense. The produce of a single pair of salmon, in a single year, if unmolested, would stock to repletion the Tweed or any other river. Left undisturbed for two years, and increasing in a like ratio, the earth itself, let alone the waters under the earth, could not contain them. Assume Mr. Buckland's calculation of 20,000 ova from a single female fish, and compare them with the recorded results of preservation, a slight, almost imperceptible, annual increase in the number captured, and we form some conception of the trifling effect of the destruction by rod of baby fish. But, it is argued, that, little or great, there is *some* diminution. When you catch and kill a handful of flies buzzing over your horse's head, there are so many flies the fewer; when a bucket of water is extracted from a lake, there is, by so much, less water. True; but look on the other side: by the system in force of restriction, of surveillance, of fines and prosecution, you make enemies of all those with whose sport you interfere. It is hardly for anyone acquainted with the working of this law to comprehend its importance. In another month thousands and tens of thousands of fry will be left in small puddles by the efflux of the water. They are seen by shepherds, artizans, boys and all who frequent the banks of the river, and, as a rule, are left to their fate—to die and rot, or to be picked up by herons and gulls. If the shepherd could hope for a gift kelt at odd times, if the artisan could look forward to the fun of angling for the smolts, if the boy were permitted to catch his few fish for supper, they would, one and all, as they used to do, ladle the fish out with their hands, or dig channe's to permit of their escape to the body of the stream.

Article by *Glasgow Mail*.

The "yellow fin" case was decided yesterday at Dunblane against the defendant. Sheriff Grahame ruled that the fish known as "yellow fins" were the same as the "orange fins" caught in the Tweed. We are not without hope that the Sheriff's decision will be reversed when the case comes before the Appeal Court. The evidence on the trial was singularly conflicting, the official and scientific witnesses for the prosecution being confronted by a formidable amount of opposing testimony from practical anglers and others. It was reluctantly extracted from the pursuer's witnesses that the idea of regarding yellow fins as sea-trout was in that district comparatively recent, in short, the prosecution might be said to have started the idea. Neither in the Act under which the prosecution took place, nor in the Tweed Fishery Acts, is there any mention of either "yellow fin" or "orange fin;" but in the course of last year the Forth Fishery Board began to raise prosecutions on a point notoriously doubtful, and on which at the present time experiments are still in progress. In any case it is questionable if the Fishery Board had authority to arbitrarily sectionise the fish as sea-trout, especially when that assumption embraced the power of proceeding criminally against the lieges. The mass of testimony to be collected from scientific writers, and confirmed by a host of practical anglers at the late trial, is nearly unanimous to the effect that the red tip to the adipose or deadfin is a distinguished characteristic of the yellow or non-migratory trout. If "yellow fins" have this feature, then their marine claim becomes at once doubtful. The scientific evidence was in general essentials valuable of its kind, so far as it went; though Dr. Günther, the sheet-anchor of the case for the Fishery Board, was obliged to admit that scientific descriptions were not likely to be of much use to practical anglers. Moreover, when two witnesses on opposite sides of the case confess their inability to distinguish a Loch Leven trout from a sea-trout, it proves the exceeding narrowness of the distinction, and the danger of multiplying "species," or vexing unscientific anglers with penalties for their inability to distinguish tweedledum from tweedledee. The probable solution of the question—and one or two of the witnesses seem to have been on the track of it—is that these same "yellow fins" of the Allan should be regarded as a variety (possibly a hybrid) of the river or non-migratory trout, which the late Dr. Knox proposed to call the "estuary trout." This variety, though it does not go out to sea like the salmon or sea-trout proper, frequents the

brackish and tidal waters of estuaries, and would very naturally be taken at such a locality as Kincardine-on-Forth. It ranges between the estuary and the stream, partaking of the mixed habits of yellow or sea-trouts, but occupying in structure, affinities, and habits a middle place between the Loch Leven and the common yellow trout, and forms a branch of the salmonidæ which has not been investigated with so much attention as it deserves. But neither as a hybrid nor as an estuary trout can the yellow fin be properly included under the protective clauses of the Salmon Acts, nor was any evidence whatever adduced, supported by practical experiments, that fish marked as "yellow fins" had been caught subsequently as *bona fide* sea-trout. When this has been proved, it will be time enough to prosecute anglers for taking them. Even were we to admit the balance of evidence to be in favour of their being sea-trout, the deduction to be drawn from the recent trial is the harshness of legislation which places anglers at the mercy of clauses, of which it requires elaborate scientific authority to interpret the full powers.—*Mail of Thursday.*

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*Glasgow Herald*, 17th October, 1882.

THE NEW FISHERY BOARD.—In accordance with the Act of Parliament passed last session, the old Scotch Fishery Board—the constitution of which, however well adapted it may have been for the times in which it was formed, had been found too contracted for the proper care and supervision of the large and important fishing industry of this country—was dissolved yesterday. The last meeting of the board was held yesterday forenoon in the offices, Royal Institution, Edinburgh, under the chairmanship of Lord Young. A letter was read from the Home Secretary, in which he intimated that under the Act the Board was now dissolved, and paid a highly eulogistic tribute to the members for the beneficial work which in the past they had carried on for the promotion and the success of the Scottish fisheries. Sheriff Guthrie Smith, who, with the Sheriffs of Argyll and Orkney, has been appointed a member of the new board, then presented his letter of appointment from the Queen; and to him were handed over the books, documents, &c., belonging to the late board. The other members not having yet received their letters of appointment, no meeting of the new board could be held, as it requires three to form a quorum. It is not yet known who are to be the other members of the board.

Copy of Statute of King James 6th of Scotland,  
 anno 1606, against the People of Scotland pol-  
 luting Lochs and running Streams in Scotland.

· A.D. 1606. Our Sovereign Lord and the Estates of Parliament, finding that the laying of Lint in Lochs and Burnes, is not only hurtful to all Fishes bred within the same, and Bestial that drinks thereof; but also the hail, waters of the said Lochs and Burnes, thereby being infected, is made altogether unprofitable for the use of man, and very noisome to all the people dwelling thereabout. Therefore Statutes and Ordains that no person or persons in time coming, lay in Lochs and running Burnes, any green lint, under the pain of Forty Shillings, *toties quoties*, for ilk time they shall contravene; and also confiscation of the lint to be applied to the poor of the Parish within the which the said Lochs and Burnes lies. And by the tenor hereof gives power to the Sessions of the Kirk of each Parish, to try, cognosce, and put this present Act to execution, and to uplift the unlaues and to confiscate and dispone upon the said lint, to the weill of the poor of the Parish as said is, and Order Letters of Publication to pass hereupon in form as effeirs.





## 45 &amp; 46 VICTORIA.

## CHAPTER 78.

A.D. 1882. *An Act to establish a Fishery Board for Scotland.*—  
[18th August 1882.]

**B**E it enacted by the Queen's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Short title.

1. This Act may be cited as the Fishery Board (Scotland) Act, 1882.

Definitions.

2. In this Act—

The expression "Herring Fishery Acts" shall mean the Acts mentioned in the First Schedule.

The expression "Salmon Fishery Acts" shall mean the acts mentioned in the Second Schedule.

Dissolution  
of Board of  
British  
White  
Herring  
Fishery.

3. On the sixteenth day of October one thousand eight hundred and eighty-two the Board of British White Herring Fishery shall be dissolved, and the present Commissioners shall be discharged of their duties.

Establish-  
ment and  
constitu-  
tion of  
Fishery  
Board.

4. A Fishery Board shall be established for Scotland.

(1.) The Board shall consist of the following members:—the Sheriffs of three Sherifffdoms, who shall be appointed by Her Majesty, and shall hold office during their tenure of the office of sheriff.

Six members, to be appointed by Her Majesty, who shall hold office for five years, and may be re-appointed.

(2.) It shall be lawful to Her Majesty to nominate one member of the Board to be chairman and another to be deputy chairman. The chairman shall receive such salary as the Commissioners of Her Majesty's Treasury may assign. Three members shall be a quorum.

(3.) There shall be a secretary to the Board, who shall be appointed by Her Majesty, and shall receive such salary as the Commissioners of Her Majesty's Treasury may assign.

(4.) The office of the Board shall be in Edinburgh, and the Board shall appoint such clerks and officers, and at such salaries, as may be sanctioned by the Commissioners of Her Majesty's Treasury.

A.D. 1882.

(5.) The first meeting of the Board shall be on the sixteenth day of October one thousand eight hundred and eighty-two.

5. (1.) The Fishery Board shall have all the powers and duties conferred upon the present Board of British White Herring Fishery by the Herring Fishery Acts and the Sea Fishery Acts, 1868 and 1875, and any order in council following thereon, except the duty of making an annual report to the Board of Trustees for Manufactures, and the power of appointing a secretary; and shall take cognizance of everything relating to the mast and deep sea fisheries of Scotland, and take such treasures for their improvement as the funds under their administration and not otherwise appropriated may admit of, but without interfering with any existing public authority or private right.

Functions of Board.  
Herring fisheries.  
Deep sea fisheries.

81 and 82  
Vict. c.  
45,  
38 & 39,  
Vict. c.  
15.

(2.) The Fishery Board shall have the general superintendence of the salmon fisheries of Scotland, and shall have the powers and duties of Commissioners under the Salmon Fishery Acts, but without prejudice to or interference with the powers of district boards.

Salmon fisheries.

(3.) The Fishery Board shall comply with any instructions which may be issued by Her Majesty's Principal Secretary of State for the Home Department, and shall make an annual report to him containing a statistical account of the fisheries, and suggestions for their regulation and improvement, which report shall be presented to Parliament.

6. It shall be lawful for Her Majesty's Principal Secretary of State for the Home Department to appoint an inspector of the salmon fisheries of Scotland, who shall hold office during pleasure, and to pay to him such salary as may be determined by the Commissioners of Her Majesty's Treasury.

Inspector of salmon fisheries.

The inspector shall under the directions of the Fishery Board inspect all the salmon fisheries of Scotland, and inquire into the operation of the Salmon Fishery Acts and report thereon from time to time to the Board, and shall attend the meetings of the Board when summoned by the chairman.

Act not to  
apply to  
River  
Tweed.  
22 & 23  
Vict. c.  
lxx.

Salaries  
and ex-  
penses.

7. This Act shall not apply to the Tweed as defined by the Tweed Fisheries Amendment Act, 1859.

8. All salaries and expenses of the Fishery Board shall be defrayed from moneys to be provided by Parliament.

## SCHEDULES.

### SCHEDULE I.

#### HERRING FISHERY ACTS.

A.D. 1882.

11 Geo. III. c. 31 ss. 11, 12, 13.	An Act for the encouragement of the White Herring Fishery.
48 Geo. III. c. 110.	An Act for the further encouragement and better regulation of the British White Herring Fishery until the 1st day of June 1813, and from thence to the end of the then next session of Parliament.
55 Geo. III. c. 94.	An Act to continue and amend several Acts relating to the British White Herring Fishery.
1 & 2 Geo. IV. c. 79.	An Act to repeal certain bounties granted for the encouragement of the Deep Sea British White Herring Fishery, and to make further regulations relating to the said Fishery.
5 Geo. IV. c. 64.	An Act to amend the several Acts for the encouragement and improvement of the British and Irish Fisheries.
1 William IV. c. 54.	An Act to revive, continue, and amend several Acts relating to the Fisheries.
14 & 15 Vict. c. 26.	An Act to amend the Acts relating to the British White Herring Fishery.

21 & 22 Vict. c. 69.	An Act to impose fees on the branding of barrels under the Acts concerning the Herring Fisheries in Scotland.
23 & 24 Vict. c. 92.	An Act to amend the law relative to the Scottish Herring Fisheries.
24 & 25 Vict. c. 72.	An Act to make further provision for the regulations of the British White Herring Fishery in Scotland.
28 & 29 Vict. c. 22.	An Act to amend the Acts relating to the Scottish Herring Fisheries.
30 & 31 Vict. c. 52.	An Act to alter and amend the Acts relating to the British White Herring Fisheries.
37 & 38 Vict. c. 25.	An Act to remove the restrictions contained in the British White Herring Fishery Acts in regard to the use of fir-wood for herring barrels.

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## SCHEDULE II.

### SALMON FISHERY ACTS.

A.D. 1882.

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25 & 26 Vict. c. 97.	An Act to regulate and amend the law respecting the Salmon Fisheries of Scotland.
26 & 27 Vict. c. 50.	An Act to continue the powers of the Commissioners under the Salmon Fisheries (Scotland) Act until the 1st day of January 1865, and to amend the said Act.
27 & 28 Vict. c. 118.	An Act to amend the Acts relating to Salmon Fisheries in Scotland.
31 & 32 Vict. c. 123.	An Act to amend the law relating to Salmon Fisheries in Scotland.

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Given under my hand at Edinburgh, the tenth day  
 of December, 1873 years,

(Signed) F. S. MELVILLE, Registrar.

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Or reasoned with myself as I do now.  
True, that my life has been with ills beset—  
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